EUROPEAN PARLIAMENT

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT D
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Corruption and conflict of interest in the European Institutions: the effectiveness of whistleblowers

STUDY

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Abstract

In view of existing whistleblowing rules applied within the European institutions and comparing these to the systems in use in other public organisations, in Europe and in the United States of America, this study provides a critical review of the efficiency of incentives and limitations to whistleblowing.

No matter the organisation's type, a strong ethical culture is the cornerstone of an efficient and effective implementation of clear whistleblowing rules. The study is based on the analysis of specialised literature, statistics, legal cases and most importantly the results of interviews of key persons within the EU institutions and of whistleblowers to identify several existing practices allowing for a discussion on improving the effectiveness of whistleblowing within the EU institutions.

The main conclusion is that whistleblowing can be made a more effective instrument for fighting corruption and conflict of interest in EU institutions, not only by adapting the current whistleblowing rules, but mainly by implementing a new generation whistleblowing programme with the right 'checks and balances': avoiding misuse on the one hand and being perceived by the potential *bona fide* whistleblower as credible on the other.

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It designated Mrs Marta ANDREASEN to follow the study.

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LIST OF ABBREVIATIONS

ACFE	Association of Certified Fraud Examiners
COCOBU	European Parliament's Committee on Budgetary Control
CoE	Council of Europe
DG	Directorate General
DG ADMIN	Directorate General Administration
DG COMP	Directorate General Competition
DG ENER	Directorate General Energy
DG ENTR	Directorate General Enterprise and Industry
DG MARKT	Directorate General Internal Market and Services
DG TRADE	Directorate General Trade
FCA	False Claims Act (US)
FR IR	Financial Regulation Implementing Rules (EU)
EC	European Commission
ECJ	European Court of Justice
EI	European Institutions
EIB	European Investment Bank
EO	European Ombudsman
EP	European Parliament
EU	European Union
FIP	Financial Irregularities Panel
FNS	Fraud Notification System
IDOC	Investigation and Disciplinary Office of the Commission
MoU	Memorandum of Understanding
MS	Member States
NGO	Non-governmental organisation
OLAF	European Anti-Fraud Office
PCaW	Public Concern at Work
PIDA	Public Interest Disclosure Act
PwC	PricewaterhouseCoopers
SOX	Sarbanes-Oxley Act
TI	Transparency International
UCLAF	Unit for Coordination of Fraud Prevention
UK	United Kingdom
US	United States of America

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EXECUTIVE SUMMARY

Background and scope

In a crisis context, the use of funds is critical for any organisation. It is therefore of the utmost importance to make sure that EU funds are allocated to their primary purpose without avoidable loss or waste.

The scope of this study is limited to the reporting of wrongdoing, illegitimate practice, misconduct or unethical behaviour related to misuse the EU funds with a focus on corruption and conflict of interest.

Funds mismanagement and funds misallocations are too frequently related to corruption, conflict of interest or other types of unethical behaviour. In this context, the effectiveness of whistleblowers is linked to the existence of an organised and integrated system within the European Institutions allowing people (internal, external, contractual, non-contractual, full-time, part-time, etc.) to report any type of funds mismanagement on condition that an effective and efficient whistleblowing policy exists.

An effective and efficient whistleblowing programme contributes to ensuring that Community funds are spent in an efficient way in the best interest of the taxpayers.

Purpose of the study

The aim of this study is to examine whether the current rules for protection of 'whistleblowers' are an effective instrument for fighting corruption and conflict of interest in the EU institutions, and - in light of 'best practice' - suggest recommendations for improvement by means of possible alternatives to enhance whistleblowing rules and/or their implementation. In 2006, a similar study examined shortcomings of the EU Institutions' current rules on whistleblowing and improvements that could be introduced on the basis of best practices applied in the Member States, the USA and the private sector. This study concluded that there were significant deficiencies in the current whistleblowing system and the rules pertaining to it within the Institutions. It concluded that Articles 22a and 22b of the Staff regulations addressed only a fraction of what would typically be defined as whistleblowing activity and that they were of limited effect in promoting desirable behaviour amongst both management and staff.[1]

The following chapters and appendices present the results of the study on 'Corruption and conflict of interest in the European Institutions: the effectiveness of whistleblowers'. In order to facilitate the lecture of this paper and its recommendations, this executive summary includes a clarification of the

[1] Rohde-Liebenau B., *Whistleblowing Rules: Best Practice; Assessment and Revision of Rules Existing in EU Institutions*, European Parliament, Directorate General Internal Policies of the Union, Budgetary Support Unit, Budgetary Affairs, IPOL/D/CONT/ST/2005_58, N° PE 373.735, Brussels, 2006

background and scope as well as a brief description of the structure of this study.

In the context of this study it is deemed necessary to define whistleblowing since interpretations can be broad and may cause the disfunctioning of any system in place.

The purpose of this study on 'Corruption and conflict of interest in the European Institutions: the effectiveness of whistleblowers' is to describe 1) whether EU staff are familiar with the current regulations on reporting of misconduct, 2) how the current regulations are being perceived and applied by them and 3) what recommendations can be made to enforce the current whistleblowing system and the protection of whistleblowers. This study is conducted on behalf of the European Parliament and is based on information available in open sources and information received through (confidential) interviews[2] and meetings and with staff of the European Commission, European Investment Bank, OLAF, the European Ombudsman, the European Court of Justice and the European Court of Auditors. Besides these institutions related to the European Union, we had meetings with other private and public organisations whose names cannot be revealed due to confidentiality agreements. We note that an independent web-based survey, scheduled to be held during this study among all staff working in EU institutions and agencies, could not take place due to concerns about privacy limitations.

This study provides an overview of EU rules and of pertinent jurisprudence and appraises the current whistleblowers policy (or policies). Identifying the strengths and weaknesses is the starting point for our recommendations. This report contains findings and recommendations, the validity and value of which were discussed in a 'closing meeting' with a selected panel of experts. The closing meeting was held among representatives of both EU institutions and non-EU related bodies. During this closing meeting potential recommendations[3] were discussed: the main objective being the strengthening of the current whistleblowing and protection system in the European Institutions.

In the first part of the report, the following four key items - as formulated in the Specific Terms of Reference for this study - are discussed:

- An overview of EU rules (including the rules of procedure of EU institutions) and legislation and also of pertinent jurisprudence, addressing the issues of 'conflict of interest' and 'corruption'. Particular attention will be paid to the question whether and to what extent the procedures consider 'whistleblower/witness protection', 'public interest disclosure' or similar concepts. An overview of the EU rules and legislation is introduced in chapter 1.
- An overview will be given of available statistical information concerning suspected and possibly established cases of fraud and other types of

[2] With whistleblowers, staff from the EU institutions and the EIB
[3] For more details regarding the recommendations discussed, please see section 4.2

maladministration in the EU institutions in recent years, notably in the years 2007, 2008 and 2009, and it will be elaborated how these cases relate to 'conflict of interest'. An overview is presented in chapter 2. This paper refers to publicly available statistical information - the Association of Certified Fraud Examiners (ACFE), the European Ombudsman, the European Anti-Fraud Office (OLAF) and interviews held in the framework of this study - concerning suspected and established cases of fraud and other types of misadministration in the EU institutions in recent years. By describing what was observed in the sample numerically or graphically, we explore the results and try to understand whether a correlation exists between different situations or whether some key indicators on whistleblowing effectiveness can be deduced. The main goal is to depict a clear and complete summary of these statistics on the social, political, and economic organisation of entities.

The second part of the report establishes a benchmark against which conclusions and recommendations are formulated:

- PwC should compare the rules and practices of EU institutions for whistleblower protection with the rules and practices in other (public and private sector) organisations and states, as well as compared to benchmarks set by 'best practice' established elsewhere. Since the European Union budget is invested in various projects aimed to achieve the EU's growth and employment objectives, a number of studies and researches have been performed regarding the whistleblowing system in application in the 27[4] European countries. 'Transparency International' (TI) has published abundant information on that topic. Because the United States of America (US) have a longer whistleblowing history and comprehensive whistleblower protection legislation, the federal US model will also be considered in this report keeping in mind that American legal protections vary according to the subject matter and the state where the whistleblowing occurs.

The analysis of whistleblowing best practices will allow us to identify a whistleblowing system following a standard procedure that multiple organisations can use for management, policy or regulation.

It is important to bear in mind that 'Best Practices' are only applicable to particular conditions or circumstances and may have to be modified or adapted according to the location, the culture, the period and the maturity of an organisation. In addition, a 'best' practice can and should evolve to become better as improvements are discovered. Chapter 3 will cover these whistleblowing systems and the identified best practices.

- The effectiveness of the current EU's rules on whistleblower protection (in particular articles 22a and 22b of the EC Staff Regulations) will be discussed and recommendations made on how the situation could be further improved. The effectiveness of the current EU's rules on

[4] Europa's website, *Les pays européens*, 2010 http://europa.eu/abc/european_countries/index_fr.htm

whistleblower protection (in particular articles 22a and 22b of the EC Staff Regulations) will be discussed in chapter 3 and recommendations will be developed on how the situation could be further improved. In this chapter, we describe a benchmarking exercise (referring to Transparency International and the British Standards Institution) and develop the benchmark specifically for the EU Institutions.

Conclusion and recommendations

Based upon the work performed and described above, the main conclusion of our study is that the current whistleblowing rules within the EU institutions are not (yet) an effective instrument for fighting corruption and conflict of interest in EU institutions. The arguments to support this conclusion can be divided into two categories. The first category relates to the provisions itself and the second refers to the implementation of these rules. Additionally we noted throughout the analysis of the cases that form takes priority over substance and this should be changed. Most interviewed whistleblowers stressed the negative experiences they had and sketched the different acts to discredit them.

In order to achieve the overall objective of an effective whistleblowing programme in the next generation for all EU institutions, an adapted whistleblowing framework needs to be established which has to have the right 'checks and balances:' avoiding misuse on the one hand and being perceived by the potential *bona fide* whistleblower as credible on the other. Therefore, this overall objective needs to be operationalised by three sub-objectives, namely:

- Encourage persons 'related to EU-institutions' to report wrongdoing to those that can undertake action;
- Ensure adequate support, effective assessment, timely investigation and appropriate action and follow-up to those reports;
- Organise strong protection for bona fide whistleblowers whilst discouraging malicious whistleblowers.

We have developed eight recommendations in the context of these sub-objectives and have indicated for each recommendation the ideal time horizon which is included in the last chapter. In order to provide the EU institutions with an outline of a transition plan in order to implement these recommendations in a scheduled project manner and within a reasonable time frame, we have also put together a critical path.

As pointed out in the 2006 study, the EU institutions should adopt a culture of 'when in doubt, report'. This means that no artificial administrative thresholds for submitting and receiving reports should be set. It is in the interest of the integrity and the reputation of the EU institutions to receive rather too much information about wrongdoing than too little or too late.

Further in the report we explain in detail the content of the recommendations made:

Recommendation 1: Adoption of an integrated ethical compliance framework

Whistleblowing needs to be embedded in the EU Institutions in a holistic manner and should be part of an integrity policy. Several elements were identified to help ensure that the many complex issues involved in the realization of this recommendation are addressed properly. These elements are described in detail in the recommendations section, such as the essential need to develop clear definitions as regards the context of whistleblowing.

Elaborate a whistleblowing policy in a transparent and constructive manner acknowledge that different issues need different reporting channels and different handling. Therefore the roles and responsibilities of key persons need to be clear. The reporting structure needs to be clearly communicated to all persons concerned. A visual reflection of such structure provides clear guidance and is included in the recommendations chapter.

As far as the multiple reporting pathways are concerned, we recommend the following tiered structure, instead of the actual structure foreseen in art 22a and 22b:

- A first and open (no guarantees for confidentiality) pathway, which needs to be seen as the natural first channel to raise a concern: the line management;
- A second and confidential pathway within each EU-institution, offering a second safe option for the potential whistleblower to make a disclosure without restrictive conditions to designated officers with a special statute that guarantees confidentiality (see also recommendation 5);
- A third and confidential pathway, positioned as a last resort to go to and therefore the access to this pathway can be limited by certain conditions: an independent body outside the EU institutions (see also recommendation 6).

Besides these three pathways, a potential whistleblower can always make a disclosure directly to OLAF.

Recommendation 2: Demonstrate that the whistleblowing system works

During the study we came across many negative whistleblowing stories which show how dangerous and destructive whistleblowing can be for the whistleblowerTherefore we strongly recommend that:

- The benefits of a confidential online reporting tool are promoted throughout all EU institutions;
- 'Model cases', when available, are used as a convincing training instrument for key persons;
- Successful measures taken in concrete cases (like measures against retaliation or sanctioning of malicious whistleblowers) are communicated in an anonymous way to staff;
- An informal or formal rewarding approach for whistleblowers in good faith should be adopted.

Recommendation 3: Develop a coordinated system for tracking all significant reports of wrongdoing for the different reporting channels

This recommendation is made since a well-designed registration system is a corner stone for every good whistleblowing system. One single solid disclosure over a period of several years can more than justify the expense of a whistleblowing programme as part of an integrity policy. The registration system needs to be coordinated - because several reporting channels will be involved – but at the same time it may not be a disproportionate scheme. The benefits of such a registration system are that it provides a confidential tool for the designated officers, it provides a good view on the (suspected) malpractice and the data can be used to evaluate and potentially further develop the integrity policy. A distinction should be made, however, between the disclosure reporting (treatment and processing of information after disclosure) and management reporting (periodic report with policy information). What such a registration system could look like and how it could operate is explained in detail in the chapter of recommendations.

Recommendation 4: Evaluate the working of the (new) whistleblowing provisions

In addition to the coordinated registration system, the EU Institutions with a higher risk profile should, on a regular basis, seek information from its line and senior managers on how the system is working. Furthermore, the EU Institutions should also assess levels of staff (and subcontractor) awareness of and confidence in the (new) policies.

In addition to the above we believe that professionalization of the whistleblowing process is a condition sine qua non to (re)build trust.

Recommendation 5: Organise internal support to potential whistleblowers

So far, internal support to potential whistleblowers is an unmet challenge within the EU Institutions. Different sources of support are detailed in the chapter of recommendations.

Recommendation 6: Set up an independent disclosure, advice and referral body

Our study clearly indicates there is an urgent need for an independent body outside the EU institutions. The functions this body should fulfill are detailed in the chapter on recommendations. We also believe it would be prudent that this independent body, in order to make the independent body effective and credible, must have the adequate powers and resources and must combine multidisciplinary expertises. As to the creation and funding of this body, we believe a solution can be found via an inter-institutional agreement.

As we come to the protection and sanctions for potential whistleblowers, we are convinced a good balance needs to be found between encouraging bona fide whistleblowers and discouraging malicious whistleblowers.

Recommendation 7: Organise strong protection and encouragement for whistleblowers

When the new whistleblowing policy will be developed, it is obvious strong protection provisions need to be added to meet the standard of the benchmark.

In the course of the study a benchmarking exercise was performed which highlighted that the most important protection is the guarantee that the identity of the whistleblower will be treated in confidence. Such a guarantee is a right, but not an absolute right. Therefore we offer an approach in the designated chapter further in the report.

Recommendation 8: Set up balanced mechanisms to deal with potential malicious whistleblowing

Throughout the meetings and interviews conducted for this study we often heard the remark that whistleblowers are perceived as troublemakers with a hidden agenda. Therefore we believe it is crucial to set up filters in the whistleblowing policy to discourage malicious whistleblowers. At the same time, however, the burden of proof for malicious whistleblowing should lie on the side of the administration.

In order to facilitate the transition from the current situation to the desired situation, we developed a path of transition indicating which recommendations should take priority and should be handled firstly.

INTRODUCTION

Financial crime and unethical behaviour remain the greatest threats to public and private organisations worldwide. No matter the organisational type, the industry sector or size, efficient prevention and timely detection are critical to safely manage risks of irregularities and crime. Employees daring to expose certain irregularities or malpractices are often referred to as whistleblowers – people who act in the interest of the organisation.

An organisation's workforce represents a valuable source of information that can be utilised to identify potential problems. Organisations need to build loyalty amongst staff, give staff the confidence to act in the public interest, and put in place clear sanctions for those who commit fraud, irregularities or adopt an inappropriate behaviour, regardless of seniority or position in the organisation.[5] Fraud and irregularities can be detected in different ways; one of the major detection methods at the disposal of organisations is 'whistleblowing'. Organisations have the responsibility to create a transparent culture, an environment of trust, guaranteeing the effective protection of staff. The protection of whistleblowers is a sensitive topic which needs to be handled with care and caution.

In the course of this study we have discussed the topic of whistleblowing and protection of whistleblowers within the EU institutions with as many relevant parties as possible. This was done not only to obtain a very good understanding of the current situation, but even more to create an as broad as possible platform for the recommendations we make in this report.

[5] PwC, *Global Economic Crime Survey 2009* (The 5th Global Economic Crime Survey, based on more than 3,000 companies in 54 countries)

1 EU RULES AND LEGISLATION OVERVIEW

Assessing the effectiveness of the current whistleblower rules applied in the EU, and therefore in each EU institution and other body (e.g. EU agencies), entails the review of systems currently in place in the EU institutions through the summarization and description of the rules and of the entities dealing with the whistleblower's concept.

Several specialists and organisations have expressed their opinion on numerous fraud related issues[6]; among them, Simone White.[7]

Her EU anti-fraud enforcement paper of 2010[8] is focused on the anti-fraud framework and its operational difficulties within the European Union in the context to counter fraud and protect the financial interests of the EU institutions. She shares her analysis regarding the legal, cooperation and internal blockages issues between EU bodies (such as Europol, Eurojust, the European Judicial Network and OLAF). She mentions in her paper the existence of gaps in the legal framework (e.g. unclear whistleblowing rules), provoking operational cooperation problems. The recommendations at the conclusion of her paper prone the improvement of the current system and the development of future projects.

The European Institutions and agencies constitute many different stakeholders[9] in relation to the whistleblowing topic: OLAF, the Investigation and Disciplinary Office of the European Commission (hereafter IDOC), the Clearing House, the Ethics Correspondents Network, the European Ombudsman, the European Court of Auditors, the European Court of Justice, etc. To better understand how the current whistleblowing policy works and which entity can act in the matter, we have developed a flowchart in order to visualize the current policies and the stakeholders involved in the existing process when one decides to blow the whistle. The flowchart below has been elaborated based on the information found in documents with regard to internal regulations or policies (Staff Regulations, Code of Conduct, Ethics Code, and Memorandum of Understanding) and elements received or clarified through interviews.

The flowchart below focuses on the current official whistleblowing rules to follow when someone has to disclose a suspected misconduct within a European institution. It symbolizes the path taken by the information flow following the disclosure of a misconduct related to financial irregularities.

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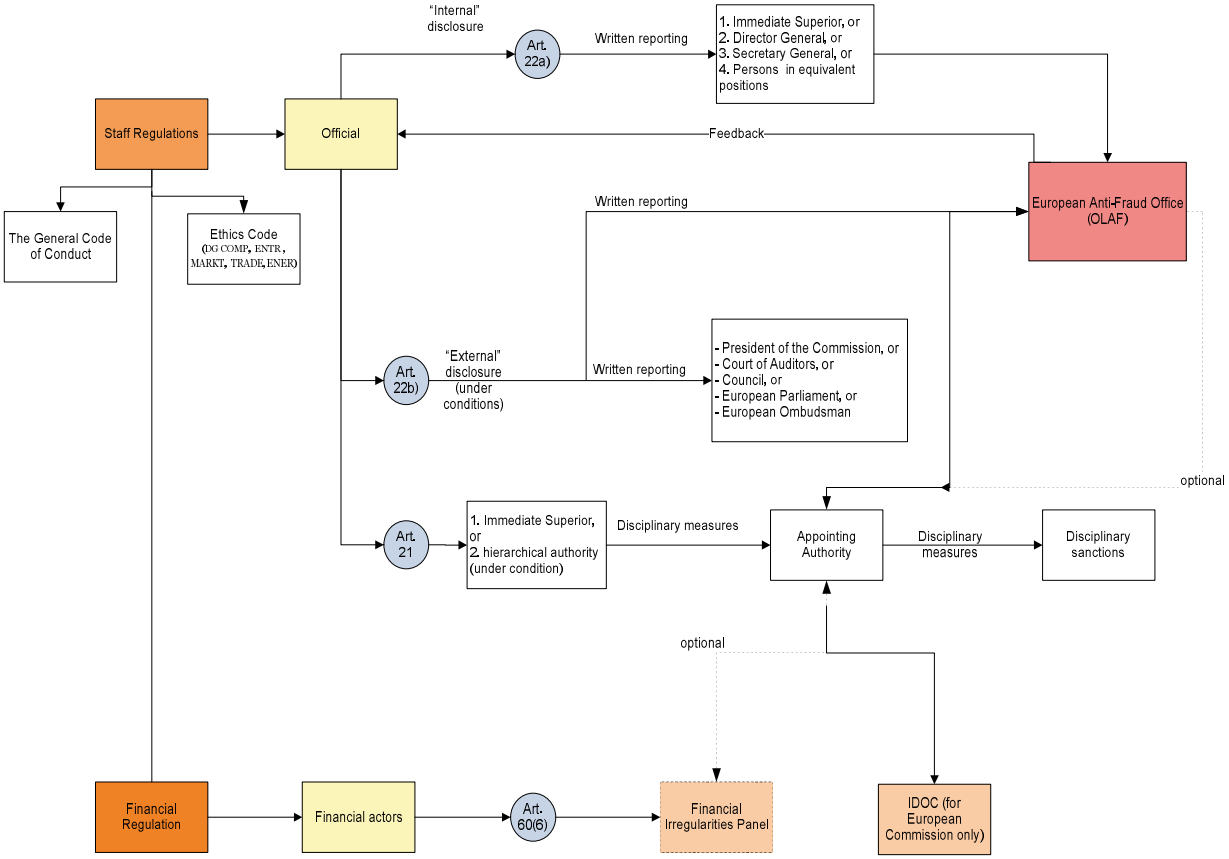
[6] Fraud related issues such as conflict of interest, asset misappropriation, mismanagement, tools to prevent and/or detect fraud, etc.

[7] Dr White works for the European Anti-Fraud Office (hereafter OLAF) as a lawyer/policy officer attached to an investigation directorate carrying out work within the European institutions, in the EU Member States and in third-world countries. She taught European law at the London School of Economics before joining the European Commission in 1999. She is a member of the Fraud Advisory Panel in the UK and of the European Criminal Law Association.

[8] Simone White, *EU anti-fraud enforcement: overcoming obstacles*, Section II. Focus on Enforcement of the Journal of Financial, Crime, Vol.17 N°1, 2010, p.81-99

[9] Further described in the next sections

Figure 1 - Flowchart[10] of the current reporting procedure in the EU institutions

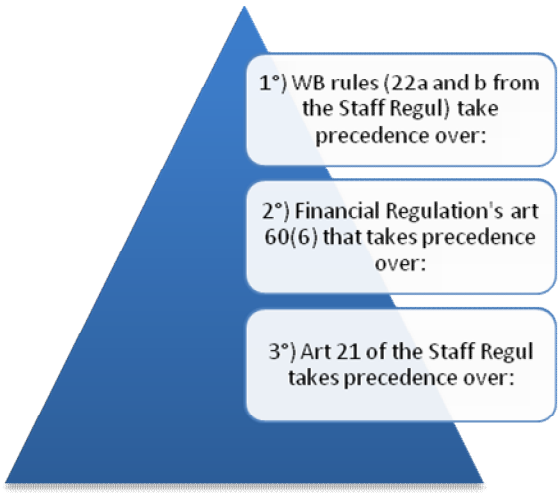


Source: PwC Analysis

As illustrated below, the European institutions rules have foreseen a four-layer rules hierarchy where the specific whistleblowing rules (articles 22a and b from the Staff Regulations) take precedence over the Financial Regulation's rules (article 60(6)) that take precedence over Staff Regulations article. In this situation, the 'special rules' take precedence over the more general ones.

[10] This represents a 'snapshot' of the existing rules at the issuance of this report. This chart may be adapted according to changes brought to the whistleblowing procedure.

Figure 2 - EU rules hierarchy



Source: PwC Analysis

1.1 Staff Regulations, Code of Conduct and Ethics Codes

1.1.1 EC Staff Regulations articles 22a and 22b

The Staff Regulations apply to all civil servants working for the EU institutions and agencies. The reporting of a potential "illegal activity" or any breach of professional duties are mentioned in the following articles:

Article 22a

1. *Any official who, in the course of or in connection with the performance of his duties, becomes aware of facts which give rise to a presumption of the existence of possible illegal activity, including fraud or corruption, detrimental to the interests of the Communities, or of conduct relating to the discharge of professional duties which may constitute a serious failure to comply with the obligations of officials of the Communities, shall without delay inform either his immediate superior or his Director-General or, if he considers it useful, the Secretary-General, or the persons in equivalent positions, or the European Anti-Fraud Office (OLAF) direct.*

Information mentioned in the first subparagraph shall be given in writing.

This paragraph shall also apply in the event of serious failure to comply with a similar obligation on the part of a Member of an institution or any other person in the service of or carrying out work for an institution.

2. Any official receiving the information referred to in paragraph 1 shall without delay transmit to OLAF any evidence of which he is aware from which the existence of the irregularities referred to in paragraph I may be presumed.

3. An official shall not suffer any prejudicial effects on the part of the institution as a result of having communicated the information referred to in paragraphs 1 and 2, provided that he acted reasonably and honestly.

4. Paragraphs 1 to 3 shall not apply to documents, deeds, reports, notes or information in any form whatsoever held for the purposes of, or created or disclosed to the official in the course of, proceedings in legal cases, whether pending or closed.

Article 22b

1. An official who further discloses information as defined in Article 22a to the President of the Commission or of the Court of Auditors or of the Council or of the European Parliament, or to the European Ombudsman, shall not suffer any prejudicial effects on the part of the institution to which he belongs provided that both of the following conditions are met:

a)the official honestly and reasonably believes that the information disclosed, and any allegation contained in it, are substantially true; and

b)the official has previously disclosed the same information to OLAF or to his Own institution and has allowed OLAF or that institution the period of time set by the Office or the institution, given the complexity of the case, to take appropriate action. The official shall be duly informed of that period of time within 60 days.

2. The period referred to in paragraph 1 shall not apply where the official can demonstrate that it is unreasonable having regard to all the circumstances of the case.

3. Paragraphs 1 and 2 shall not apply to documents, ¯deeds, reports, notes or information in any form whatsoever held for the purposes of, or created or disclosed to the official in the course of, proceedings in legal cases, whether pending or closed.

Since May 2004, the European Institutions can refer, through the EC Staff Regulations, to explicit whistleblowing provisions. The Staff Regulations describe the general conditions of employment applicable to each official of the European Community and to any other people concerned by the 'Conditions of employment of other servants'. These regulations contain policies related to the employment contract. Some of these policies address the reporting of serious misconduct.

The articles 22a and 22b, introduced in the Staff Regulations in 2004, create a duty for all officials to report concerns about fraud, corruption or other serious wrongdoing either within the European institutions or directly to the European Anti-Fraud Office (OLAF).

Article 22a outlines the duty for any official of the Communities to report serious wrongdoings, 'in connection with the performance of his duties', within his European Institution (through either his immediate superior or his Director-General or the Secretary General) or directly to OLAF. In the EU organisation system and in the framework of this study, this article can be considered as 'internal whistleblowing'.

Under the fulfilment of certain conditions[11], article 22b protects officials disclosing information on such serious wrongdoings to EU bodies outside the own institution (in the EU organisation system and in the framework of this study, this article can be considered as 'external whistleblowing'), namely 'to the President of the Commission, the Court of Auditors, the Council, the European Parliament, or to the European Ombudsman.' If the conditions are not fulfilled, and if the procedures are not literally respected, the protection will not be applicable. For example, a staff member reporting to a person or an entity that is not listed in the policies will not be protected as foreseen in the Staff Regulations.

Whistleblowing policies exist in theory but may differ in practice. 'Statistics show that since 2004 (the introduction of the Articles 22a and 22b), very few whistleblowers have come forward.'[12] This has also been confirmed throughout the underlying study: very few actual whistleblowers came forward and shared their opinion with us. This remark does not just concern recent cases (from 2007 onwards), but is valid as well for older cases from before 2007. We also note that the interviewers learned that fewer whistleblowing cases have been reported and followed up since the implementation of articles 22a and 22b. The reasons mentioned by the interviewees range from the articles being clearer than before and whistleblowers turning to their immediate hierarchy, or notably because of flaws in whistleblower protection when put in practice.

Moreover, restrictions that lie in the definition of the terms used are of the utmost importance in the interpretation of these rules. Because of the formulation of the policies, they do not cover all persons or behaviours, thereby restricting the scope of the articles 22a and 22b. For instance, if we take the word 'official' which refers to the persons targeted by these policies, it is not clear if trainees are covered as well. Temporary staff, contractors and auxiliary agents are covered under the 'conditions of employment of other agents' which refer to the Staff Regulations. Additionally, the Investigation and Disciplinary Office of the Commission (IDOC) has informed all Directorate Generals about the specific rules applicable to temporary staff and the like.

It is important to note that in 2006 the European Parliament published a study on whistleblowing rules and best practices. This study already highlighted among other things that 'the basic concept contained in the articles 22a and 22b has existed in practically the same format since 1999 outside the Staff Regulations as a 'Commission Decision'. This basic concept was included in the Staff Regulations

[11] For conditions, see articles 22a and 22b previously quoted
[12] White S., *EU anti-fraud enforcement: overcoming obstacles*, Section II. Focus on Enforcement of the Journal of Financial Crime, Vol.17 N°1, 2010, p.84

to increase its 'visibility'.[13] This study also suggested that the current whistleblowing provisions appeared to be characterised by complexity and confusion. This 2006 study provides an analysis of the part of Art 22a which protects staff who report concerns from prejudicial effects. The problem is that this promise is only applicable to acts 'on the part of the institution'. The article should be extended to cover any prejudicial effects, whether on the part of the institution, whether by superiors of the whistleblower or any other staff in any way employed by the EU institutions. It should also provide that if such actions do occur, any detriment should be made good. The way the paragraph is currently phrased, it is not likely even to encourage internal disclosures, because by implication it warns that retaliation may be expected from individuals, but provides no protection against it. [14]

The in-depth examination of the articles 22a and 22b in the 2006 study concluded that a revision of these rules was necessary: 'Articles 22a and 22b of the Staff Regulations address only a fraction of what would typically be defined as Whistleblowing activity.' Moreover the articles 22a and 22b appear to focus on the reporting duty rather than encouraging officials to be transparent and to act properly. It appears from these articles that the EU Institutions are looking to avoid negative news rather than intrinsically seeking to promote correct and transparent culture. Furthermore the duty to report is described as follows: 'Any official who, in the course of or in connection with the performance of his duties, becomes aware of facts which give rise to a presumption of the existence of possible illegal activity, including fraud or corruption, detrimental to the interests of the Communities, or of conduct relating to the discharge of professional duties which may constitute a serious failure to comply with the obligations of officials of the Communities, shall without delay inform either his immediate superior or his Director-General or, if he considers it useful, the Secretary-General, or the persons in equivalent positions, or the European Anti-Fraud Office (OLAF) direct.' This description and the interpretation thereof make it virtually impossible to comply with the terms 'honestly and reasonably'. The study indicates that, in practice, reporting does not lead to proper follow up and corrective measures. This is also a possible explanation why there are few known cases of actual whistleblowing. The previously conducted study on whistleblowing in 2006 stressed that the internal reporting channels expected in these regulations 'are not nearly wide enough to facilitate the disclosure of information.' It seems therefore that these policies do not contain the appropriate incentives to encourage whistleblowing.

In her paper on EU anti-fraud enforcement, Dr White pointed out that 'the legal framework is very scant and does not make it possible for whistleblowers to give information anonymously through an intermediary'. In the United Kingdom the Public Interest Disclosure Act (PIDA)'[15] foresees that potential whistleblowers can

[13] Rohde-Liebenau B., *Whistleblowing Rules: Best Practice; Assessment and Revision of Rules Existing in EU Institutions*, European Parliament, Directorate General Internal Policies of the Union, Budgetary Support Unit, Budgetary Affairs, IPOL/D/CONT/ST/2005_58, N° PE 373.735, Brussels, 2006, p.42-46
[14] Ibid
[15] White S., *EU anti-fraud enforcement: overcoming obstacles*, Section II Focus on Enforcement of the Journal of Financial Crime, Vol.17 N°1, 2010, p.84

turn to specific institutions, that have obtained the title 'prescribed regulator', in case internal disclosure did not bring the desired outcome and follow-up. She adds that 'prejudicial effects' are not defined in the Staff Regulations and it is clearly up to the institution to decide whether the whistleblower has acted reasonably and honestly (this is tantamount to 'a good faith' test)'. Her paper also indicates that, from an institution perspective, there is no clarity about what sort of information the whistleblower should produce in order to obtain the necessary protection. There is no notion of 'qualifying disclosure.' [16]

In another recent publication 'Le 'whistleblower' dans les institutions de l'Union Européenne: l'oiseau est-il apprivoisé ?' [17], Dr White shares her opinion on gaps in the whistleblowing policies currently applicable in the EU institutions. Sometimes, some clarifications or interpretations of the rules have been derived from the European Ombudsman's opinions and rulings of the Court of Justice of the European Union (for further details, we refer to the case studies in appendix A.10.). This publication clearly states that even though the Court of First Instance and the European Ombudsman have contributed to the evolution of the information management done by internal informants as set up by the Commission in 2004, fundamental questions remain unanswered; these questions relate to anonymity, protection against retaliation and the need to ensure good information quality at the level of the investigation departments.

1.1.2 Code of conduct

The ways of working and the rules and procedures applicable to all staff working within the European Institutions are incorporated in the Staff Regulations and more in particular in Title II: 'Rights and obligations of officials' from articles 11 to 26. Through our interviews we have obtained the specific ethics codes that are created and are applicable to the following Directorate Generals: DG COMP, DG ENTR, DG MARKT, DG TRADE, DG ENER. Only DG COMP, MARK and TRADE mention whistleblowing in their codes, whilst DG ENTR has a special reference to the Staff Regulations 22a and 22b on its intranet page. These codes have common general rules but each DG has added the issues specific for its own activities (These documents are referred to in the bibliography under "European Commission".) We also refer to the documents in appendix A.8.2 which refer to more documents in relation to ethics. In order to raise awareness to the ethical rules of the European civil service a comprehensive ethics initiative was launched in 2009 by DG Admin.[18]

A specific code of conduct for Commissioners was introduced by the Commission President, Romano Prodi, in September 1999 (SEC(1999)1479 of 16 September 1999), based on a draft of the preceding Santer Commission. The current version of the Code of Conduct of Commissioners is laid down in Commission document SEC(2004)1487/2 of 24 November 2004. Neil Kinnock, one of four commissioners

[16] For example, in her paper, Simone White suggests that only new disclosed information is in the scope of a 'qualifying disclosure'
[17] White S., *Le 'whistleblower' dans les institutions de l'Union Européenne: l'oiseau est-il apprivoisé?*, Revue du Marché Commun et de l'Union Européenne, 2010
[18] European Commission, *Annual Report DG Admin*, 2009, p.13-14

that remained in place after the fall of the Santer Commission, was responsible for reforming the Commission. The follow-up of this code is monitored by an ad hoc Ethics Committee with external experts. In this code we did not identify a link with whistleblowing nor the way that, at this level, cases of whistleblowing should be dealt with.

According to recent newspaper articles, the Code of Conduct for Commissioners and Cabinets is now perceived as not strict enough and should be revised soon. This has been confirmed during our interview with the Public Service Ethics of the Secretary General (hereafter SG). As a matter of fact the Code is being revised since January 2011 in order to bring more clarity on the following issues: extension of cooling-off period to 18 month, better monitoring during and after the mandate and determination of criteria for conflicts of interest (what is acceptable and what not).

1.2 FINANCIAL IRREGULARITIES PANEL ('FIP')

Article 66 of the Financial Regulation provides that each European institution must set up a specialised financial irregularities panel. This panel needs to voice its opinion on the reported financial irregularities: have they occurred, how serious are they, what are potential consequences, what is the impact, etc.[19]

'The relation between the reporting duties under the whistleblowing rules and under the Financial Regulation is set out in Article 60(6) of the Financial Regulation: 'In the event of any illegal activity, fraud or corruption which may harm the interests of the Community, he/she shall inform the authorities and bodies designated by the applicable legislation.'
The reporting duty under the whistleblowing rules for staff therefore takes precedence over the reporting duty to the Financial Irregularities Panel. This means that a financial officer, when faced with a serious irregularity, should follow the whistleblowing procedure as explained above.' [20]
The obligation to report serious irregularities applies to all officials and other agents of the institutions. The scope of this duty to report does not only cover irregular financial transactions but also extends to other forms of serious wrongdoings. According to the information gathered through the numerous interviews, we noted that despite the obligation to report wrongdoings and the disciplinary sanctions foreseen by Article 86(1) of the Staff Regulations, there are in practice no sanctions for not reporting wrongdoings and very few sanctions for the persons committing the wrongdoing.

There is an additional obligation to notify the FIP of apparently irregular transactions. This only applies to members of staff acting under the Financial Regulation, i.e. those involved in financial management and the scrutiny of transactions.

[19] European Parliament, Committee on Budgetary Control, Rapporteur: Michiel van Hulten, *Draft Report for the Bureau on amendments concerning the draft decision of the Bureau of the European Parliament on a Specialised Financial Irregularities Panel*, PR\521254EN.doc , PE 338.190 , 30 January 2004
[20] European Commission website, *Reporting serious wrongdoing: Whistleblowing*, Reforming the Commission, last update: 22/05/2006

Based upon our interviews it appears that this panel only meets on an ad hoc basis – apparently very rarely – and it only has an advisory role (e.g. if OLAF wants to know if an issue can be considered as an irregularity). The articles 66(4) and 60(6) FR, further elaborated in articles 74 and 75 IR of the Financial Regulation are applicable. In principle, each EU institution should have its own FIP.

Advises of the FIP can be given to different bodies/authorities:

- Financial irregularity referred to FIP by authorising officer (AO) => FIP provides opinion to AO;
- Financial irregularity referred to FIP by authorising officer (AO), FIP concludes that OLAF should be informed => FIP provides opinion to appointing authority and informs OLAF;
- Financial irregularity referred to FIP by a member of staff => FIP transmits the file to the appointing authority;
- FIP detects systemic problems => it shall send a report with recommendations to the AO and internal auditor.

The abovementioned articles state that each EU institution can issue its own procedures for the functioning of its FIP.

This panel does not play an active role in the whistleblowing procedure in the sense that a potential whistleblower will bring his case to the panel.

1.3 OLAF

The European Anti-Fraud Office (OLAF) is an administrative investigative service established by the Commission Decision of 28 April 1999.

'The mission of the European Anti-Fraud Office (OLAF) is to protect the financial interests of the European Union (EU) and therefore of its citizens, and the reputation of the European institutions. It achieves this by investigating fraud, corruption and any other illegal activity affecting those interests, including misconduct within the European Union institutions and bodies; by assisting Union and national authorities in their fight against fraud; and by means of deterrence, prevention and strengthening legislation, making it more difficult for fraud and irregularities to occur and so contributing to public trust in the European project.

OLAF replaced the Task Force for Coordination of Fraud Prevention, which succeeded the Unit for the Coordination of Fraud Prevention (UCLAF), created in 1988 by the Commission within its Secretariat-General.'[21]
As mentioned above, the article 22a of the Staff Regulations outlines 'the duty' for any officials of the Communities to report serious wrongdoings, '*in connection with the performance of his duties*', within his European institution (through either his immediate superior or his Director-General or the Secretary General) or directly to OLAF.

[21] OLAF Manual, Operational Procedures, 1st December 2009

'Investigation reports drawn up by OLAF do not produce binding legal effects. They are only recommendations and it is entirely up to the national authorities, or to the institution, to decide whether a judicial procedure or a disciplinary procedure should be opened.' [22] OLAF maintains investigation powers only but cannot impose sanctions. The European Court of Justice confirmed in 2003 that OLAF's reporting has no binding legal effects[23] (see case T-215/02 Santiago Gomez Reino v.[24] Commission and appendix A.10.2 referring to the Strack cases).

Mr. Santiago Gomez-Reino used to work as director for the ECHO programme, the humanitarian aid office of the European Commission. He held this position between October 1992 and December 1996. This programme caused discussions between the Commission and the European Parliament that eventually contributed to the resignation of the Jacques Santer Commission in 1999.

The existence of disciplinary proceedings initiated against M.Gomez-Reino was motivated by a potential failure to comply with certain standards in budgetary allocation in emergency funds for the former Yugoslavia and the African Great Lakes region.

In the course of 1999, Mr. Gomez-Reino was cleared by the Commission because it was ruled that he had not failed in his statutory obligations.

The Disciplinary Board also recognizes that in the context of humanitarian crises in the former Yugoslavia and the African Great Lakes region, Mr. Gomez-Reino, as director of Echo, had a political obligation of results. The disciplinary procedure from 1999 concluded that 'officials cannot be held personally responsible for any wrongdoing by their staff, according to a landmark ruling by the Commission's internal disciplinary body.'[25,26]

In order to attract potential fraud related intelligence from anyone who was willing to talk – both external and internal persons - OLAF started the so-called free phone initiative in 2000. It is important to underline that this initiative had a much wider scope and was not limited to staff wanting to speak up (whistleblowers). Because this free phone system turned out to be time-consuming[27] and the outcome was not effective, OLAF launched a new electronic Fraud Notification System (FNS) on 1 March 2010, enabling citizens and EU civil servants – in its annual reports OLAF uses the term informants - to report (even anonymously) any misconduct via the Internet. The FNS gathers information through questionnaires. This approach has a double advantage: (1) the information obtained is more accurate (related to the investigative mandate of OLAF) and (2) people are less inclined to put a great deal of effort into reporting a non-actual

[22] White S., *EU anti-fraud enforcement: overcoming obstacles*, Section II. Focus on Enforcement of the Journal of Financial Crime, Vol.17 N°1, 2010, p.90
[23] EUCRIM, The European Criminal Law Association's Forum, 'Focus on the European Arrest Warrant', 1-2/2006, p.8
[24] Referring to the order of the Court of First Instance in Case T-215/02 Gómez-Reino v Commission [2003] ECR-SC I-A-345 and ECR II-1685, paragraphs 50 and 51
[25] Harding G., Ex-*ECHO chief cleared*, EuropeanVoice.com, 22.07.1999
[26] Soumois F., *Santiago Gomez-Reino réhabilité Echo: un haut fonctionnaire européen lavé de tout soupçon*, Le Soir, 15 July 1999
[27] Meeting with OLAF representatives: 'Sometimes there were over 500 calls a day'

case. The reported cases via FNS are monitored and an interactive process is possible if the informant (which can be a whistleblower) approves the opening of a secured mailbox. From that moment on, the informant can exchange information with the investigator and the investigator can ask questions on the basis of the obtained information. The system, however, is not set up to encourage anonymous reporting. Although the system allows the possibility to remain anonymous, the idea is to build trust with the informant during a certain period of time after which the whistleblower feels comfortable enough to disclose his or her identity. Once this is established the investigator will try to have a face-to-face meeting with the whistleblower.

Considering the above, we deem it is necessary to develop a clear definition of whistleblowing and to develop clear criteria on the basis of which a person can be categorised as a bona fide whistleblower. Such a definition could be added to the current Staff Regulations 22a and 22b.

1.4 The Investigation and Disciplinary Office of the Commission (IDOC)

IDOC is the competent body within the European Commission that is set up to perform impartial, administrative investigations in case officials are suspected of having failed to comply with his or her obligations under the Staff Regulations[28]. IDOC is also the body that is empowered to undertake disciplinary actions against any non-compliant persons. The cases investigated by IDOC can partially overlap cases investigated by OLAF. In order to overcome potential issues and to work efficiently and effectively, OLAF and IDOC meet on a regular basis to exchange and share competences. Where OLAF is entrusted to investigate serious matters related to the discharge of professional duties, IDOC is more in charge of disciplinary cases in order to facilitate the sharing of competences and the follow up of disciplinary procedures.[29]

In order to facilitate this alignment and cooperation between OLAF and IDOC a Memorandum of Understanding (MoU) was agreed in 2003.[30] Although this MoU was never signed, it is applied in practice. According to this MoU, OLAF has the investigative prerogative and needs to be consulted in advance before IDOC can open an internal investigation. We have attached the MoU in appendix A.8.1.3

The sources of information of IDOC range from anonymous letters to the DGs themselves. Most cases handled by IDOC are harassment and bullying cases. Beyond the administrative enquiries run by IDOC itself, IDOC is also in charge of the disciplinary actions to be undertaken at the end of OLAF's investigations concerning Commission staff.

[28] Decision of the Commission, 28 April 2004, *General implementing provisions on the conduct of administrative inquiries and disciplinary procedures*, refer to appendix A.8.1.4
[29] White S., *EU anti-fraud enforcement: overcoming obstacles*, Section II. Focus on Enforcement of the Journal of Financial Crime, Vol.17 N°1, 2010, p.89
[30] SEC (2003) 885/2, memorandum d'entente OLAF/IDOC-ADMIN (version diffusée suite à la réunion hebdomadaire des chefs de cabinet du 22 juillet 2003), refer to appendix A.8.1.3

1.5 CLEARING HOUSE

The Clearing House Group was created after the Eurostat scandal in order to avoid that the EC is confronted via the media with unknown fraud cases. It is composed of the Director-General of OLAF, the Secretary-General and/or the President of the Commission.[31]

This group meets every two months and informs the responsible authority of the concerned DG on a need-to-know basis in order to take preventive measures, like for instance moving people (without obligation to inform them of the reason) or suspend contracts with external parties (even if a claim can be expected).

In the information exchanged, the names of potential whistleblowers are not mentioned (thereby ensuring the protection of the identity of the whistleblower), except if, when at the closing of an investigation, it becomes clear that the whistleblower was malicious and disciplinary action needs to be taken. This is then the responsibility of IDOC. In light of this we deem it is necessary to define the term 'malicious whistleblower' just as much as defining whistleblowing in general is required.

Within the Clearing House Group, the decision has been taken to act on a case–by-case basis and not to communicate about sanctions taken against malicious whistleblowers, because this could be perceived as demotivating.

1.6 THE ETHICS CORRESPONDENCE NETWORK

The Ethics Correspondence Network has been created in the Commission in order to guide and advise officials on ethical dilemmas and/or questions. The ethic correspondents need to inform the requestors about the adequate procedures to be followed.

Our interviews and a mini-survey conducted among ethical correspondents clearly indicate that the Ethics Correspondents Network does not address whistleblowing issues. The ethical correspondents are overall approached for ethical dilemmas which cannot be considered to be whistleblowing cases. However, their existence has an indirect impact on the effectiveness of the whistleblowing procedure; for instance, because no ethical network exists within the other EU institutions (i.e. except the Commission) nor within the EU agencies. The agencies are relatively small in size and therefore the protection of whistleblowers within an agency is considered to be difficult. A staff member of an agency that wants to disclose a harassment matter does not have anybody to go to and therefore refers the complaint to OLAF, which is not the right body for this kind of cases.

1.7 THE EUROPEAN OMBUDSMAN

The function of the European Ombudsman is to analyse and investigate cases of possible maladministration within the European institutions and agencies. Both officials and EU citizens may file a complaint directly with the European

[31] Communication from the Commission, *Completing the reform mandate progress report and measures to be implemented*, 10.02.2004, COM (2004) 93 final, section 4.2.

Ombudsman in case they want to follow the non-judicial path (cases are filed with the European Court of Justice in case they decide to follow the judicial path). They have to choose between one or another, and the decision made by either body is conclusive and final. The European Ombudsman may, on the other hand, start an inquiry based upon information obtained from a whistleblower. The powers of investigation of the Ombudsman are established in the Statute of the Ombudsman.[32]

'Article 228 of the Treaty on the Functioning of the European Union (TFEU) (previously Article 195 of the Treaty establishing the European Community) extends the Ombudsman's mandate from complaints concerning maladministration in the activities of 'Community institutions or bodies' to 'Union institutions, bodies, offices, or agencies.'[33] There is no clear definition of maladministration, however. So far the European Ombudsman has adopted the view that maladministration is about unlawful behaviour. The role of the European Ombudsman is limited in the judgement of cases that are brought to his attention or inquiries initiated by its own initiative. The European Ombudsman cannot perform investigations on the alleged facts; rather, he relies on the work performed by the empowered institutions that have conducted investigations. The role of the European Ombudsman is to analyse in an independent and impartial manner whether reported cases have properly been dealt with by the responsible institutions.[34] The European Ombudsman intervenes in the light of Art 22b of the Staff Regulations if the responsible entity, or OLAF, does not take appropriate action in due time.

Before the Staff Regulations came into force the European Ombudsman treated, between 4 April 2002 and 1 May 2004, 4 cases of whistleblowing. After the installment of the Staff Regulations another 4 complaints were submitted. All these whistleblowers invoked article 22b of the Staff Regulations. We were informed that in one case a whistleblower submitted a complaint against OLAF because of its response to a request for access to documents. Because of the small number of whistleblowing cases it is difficult to make or draw any statistical conclusions as to the improvements that could be made to the current rules. According to the European Ombudsman, the main issue that has to be overcome is the fear of people to be blacklisted. This could be realised by focusing on the management culture in the institutions which would make it easier for persons to disclose. It needs to be assessed to what extent the current rules allow for such a management culture that is open, transparent and accessible.

They have the choice to contact OLAF directly if they do not feel comfortable enough to go to their direct line management. According to the European

[32] European Parliament, *Decision of the European Parliament 94/262/ECSC, EC, Euratom of 9 March 1994 on the regulations and general conditions governing the Ombudsman's duties*, 1994 OJ L 113 p 15 last amended by Decision of the European Parliament 2008/587/EC, Euratom of 18 June 2008, 2008 OJ L 189, p.25

[33] European Ombudsman, *The 2009 Annual Report of the European Ombudsman*, European Union 2010, Luxembourg, p.14

[34] Harden I. (Secretary General European Ombudsman), *Protecting the Whistleblowers–Asian and European Perspectives, The Role of the European Ombudsman as a Protector of the Public Interest*, the 13th International Anti-Corruption Conference, Workshop Session II, Athens, Greece, 31st October 2008

Ombudsman this choice is less evident for staff working in control bodies such as the European Ombudsman or the European Court of Auditors. There should be a clearer distinction between wrongdoing occurring in their own institution (which could be a control institution) and wrongdoing in another institution. The European Ombudsman also contributed through some of its decisions to clarify 'the whistleblower's right to be informed about the outcome of the investigation and his right to be informed about the duration of the investigation.' [35]

[35] White S., *EU anti-fraud enforcement: overcoming obstacles*, Section II. Focus on Enforcement of the Journal of Financial Crime, Vol.17 N°1, 2010, p.85

2 STATISTICAL INFORMATION

Because of the lack of or the existence of inadequate definitions it is overall difficult to assemble and analyse statistical data. Regarding available statistical information within the EU institutions about whistleblowing, reported cases and outcome, we have encountered negative responses on numerous occasions. The first reason provided was that a standard tracking system or tool for reported cases does not exist. We also refer to the Parliamentary question to the Commission by Mrs Marta Andreasen on frivolous, malicious and other whistle-blowing.[36] In the answer of the Commission by Mr Šefčovič it is clearly stated that 'Commission is not in a position to keep statistics on the number of whistleblowers per year, bearing in mind that there are a variety of reporting channels, and whistleblowers may also address themselves directly to OLAF. In such cases, the Commission is not necessarily aware of the fact that potentially serious matters were reported to OLAF. Only OLAF, as end recipient of the information, is able to compile statistics, which are included in its annual reports.'[37]

Another, similar reason is the issue of confidentiality in the recording of reported cases.

In addition to the two reasons highlighted above we feel that it is a prerequisite to clearly define the elements from which one wishes to draw statistical data. It is scientifically not possible to measure and compare data if they are not properly defined.

A selection of publicly available statistical information is analysed in section 2.1. These statistics are from diverse sources and relate to:

- Established cases of fraud and other types of maladministration in Europe (the Association of Certified Fraud Examiners studies, The Network); and
- Suspected and possibly established cases of fraud (the European Ombudsman and the European Anti-Fraud Office (OLAF)).

By describing what was observed numerically or graphically, we explore the results and try to understand whether a correlation exists between different situations or whether some key indicators on whistleblowing effectiveness can be deduced. The main goal is to depict a clear summary of these statistics contributing to understand the impact of legal, social, political, and economic factors on fraud.

In section 2.2., we describe three cases in detail using publicly available sources.

[36] European Parliament, *Parliamentary Question for written answer E-00213/2011 to the Commission*, Rule 117, Marta Andreasen, 24 January 2011
[37] European Commission, E-00213/2011, *Answer given by Mr Šefčovič on behalf of the Commission*, 11.03.2011

2.1 FACTS AND FIGURES ON WHISTLEBLOWING

The Association of Certified Fraud Examiners (hereafter ACFE) is an American association grouping nearly 55 000 members worldwide and gathering fraud examiners that provides training, education and support to Certified Fraud Examiners worldwide. Fraud examiners can become certified with the ACFE through a proven track record of investigations and projects or through an examination. The association is prone to gather and analyse data related to fraud, fraud prevention and detection, corruption, and so on. It publishes statistical reports and survey reports on a regular basis. The ACFE is using statistics retrieved from established fraud cases (suspected and undiscovered frauds are not in scope of these reports).

To complete this particular section with suspected cases, we will refer to publications from the European Ombudsman and OLAF.

2.1.1 The Association of Certified Fraud Examiners (ACFE)

The ACFE releases biennial studies providing specific information on internal fraud cases through a report called 'Report to the Nations on Occupational Fraud & Abuse'. The 2010 edition gathers fraud information related to 1 843 cases of occupational fraud that were reported by the Certified Fraud Examiners (CFEs) in charge of the fraud investigations.

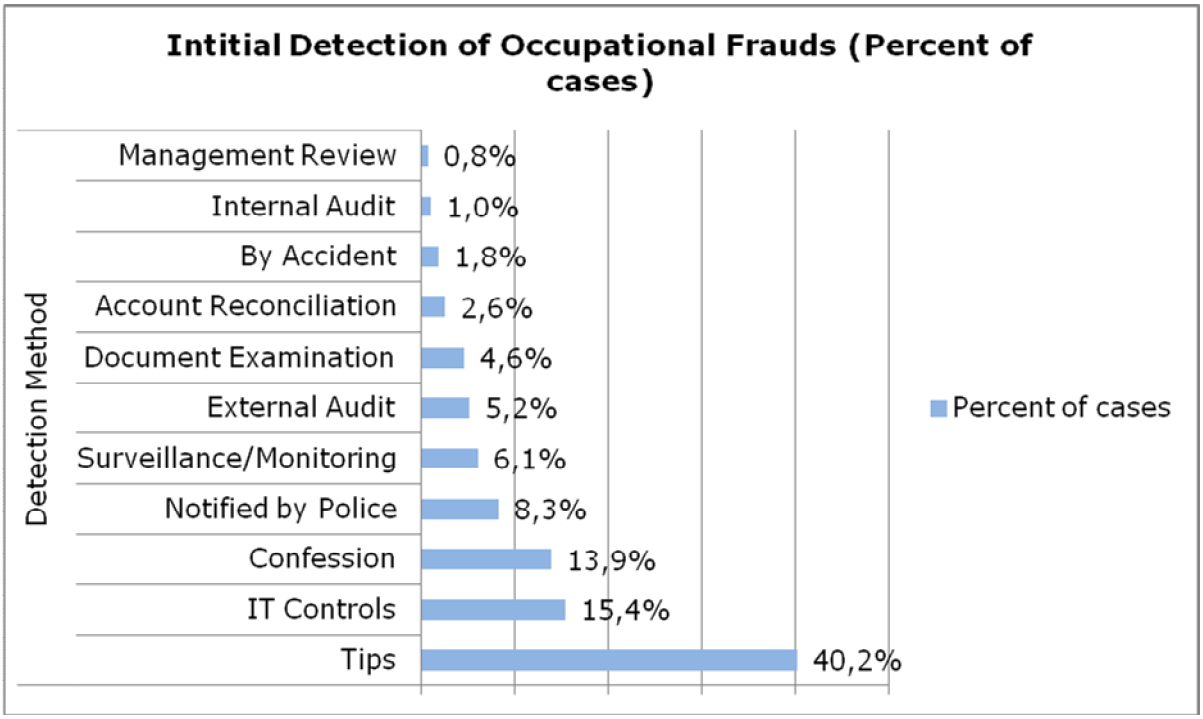
This 'Report to the Nations' is the result of a survey introduced in more than 100 countries on six continents, with more than 43% being non-US cases. It clearly identifies the consistency of fraud patterns around the world. 'While some regional differences exist, for the most part occupational fraud seems to operate similarly whether it occurs in Europe, Asia, South America or the United States.'[38]

Detection method

Corroborating the PwC study (refer to appendix A.9) and the previous ACFE reports, the charts below illustrate clearly that tips were by far the most common detection method worldwide (slightly more than 40%) and Europe-wide (40%).

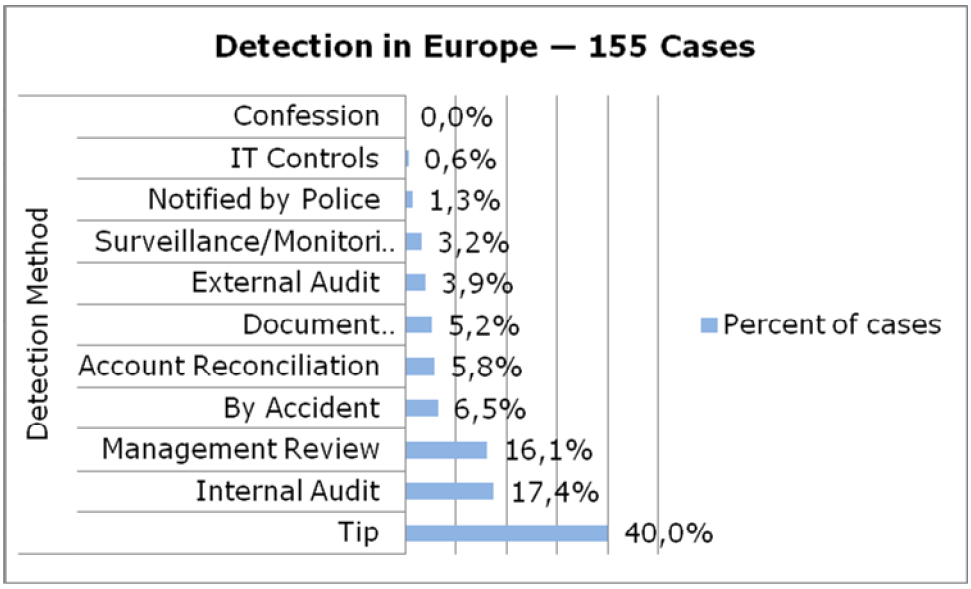
[38] Association of Certified Fraud Examiners (ACFE), *Report to the Nations on Occupational Fraud and Abuse*, Austin (Texas – USA), 2010 Global Fraud Study, p.2

Figure 3 - ACFE survey: Detection method of Occupational Frauds (Source: ACFE Report to the Nations 2010)



Source: ACFE Report to the Nations 2010

Figure 4 - ACFE Survey: Detection method in Europe



Source: ACFE Report to the Nations 2010

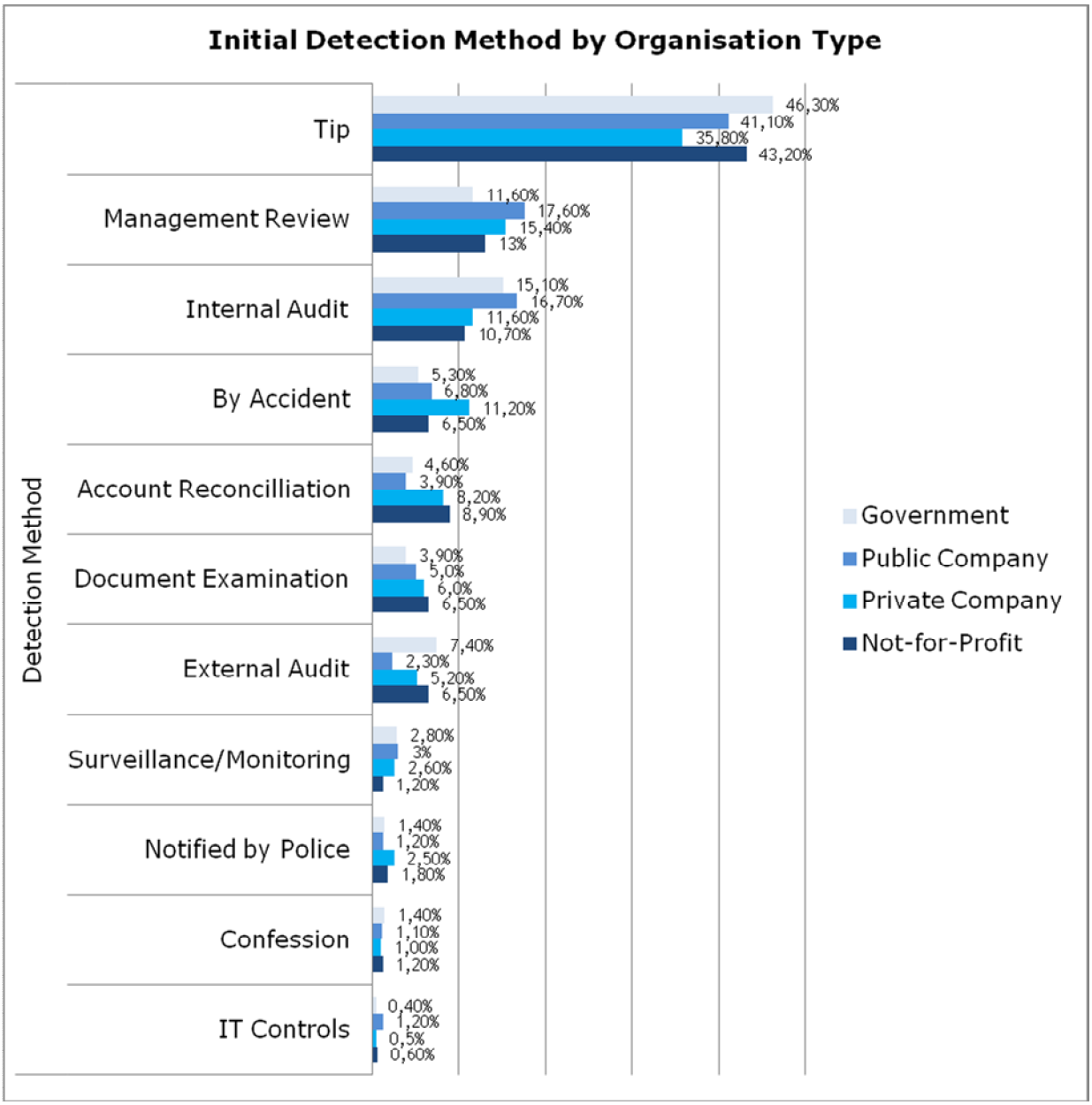
The chart above indicates that tips are also the most common method of detection in Europe. Secondly it shows that internal audit functions are useful since they are responsible for the detection in over 17% of all cases. This 2010 survey of the

ACFE indicates as well that the implementation of a hotline system greatly enhances organisations' ability to detect fraud and limit subsequent losses.[39]

Organisation's type

The below chart gives an indication of the different methods of detection depending on the type of the organisation. It shows that the respondents of the survey active in governmental and public organisations indicate that tips are a very important detection tool for fraud whereas this seems to be less so in private organisations.

Figure 5 - ACFE Survey: Detection Method by Organisation Type



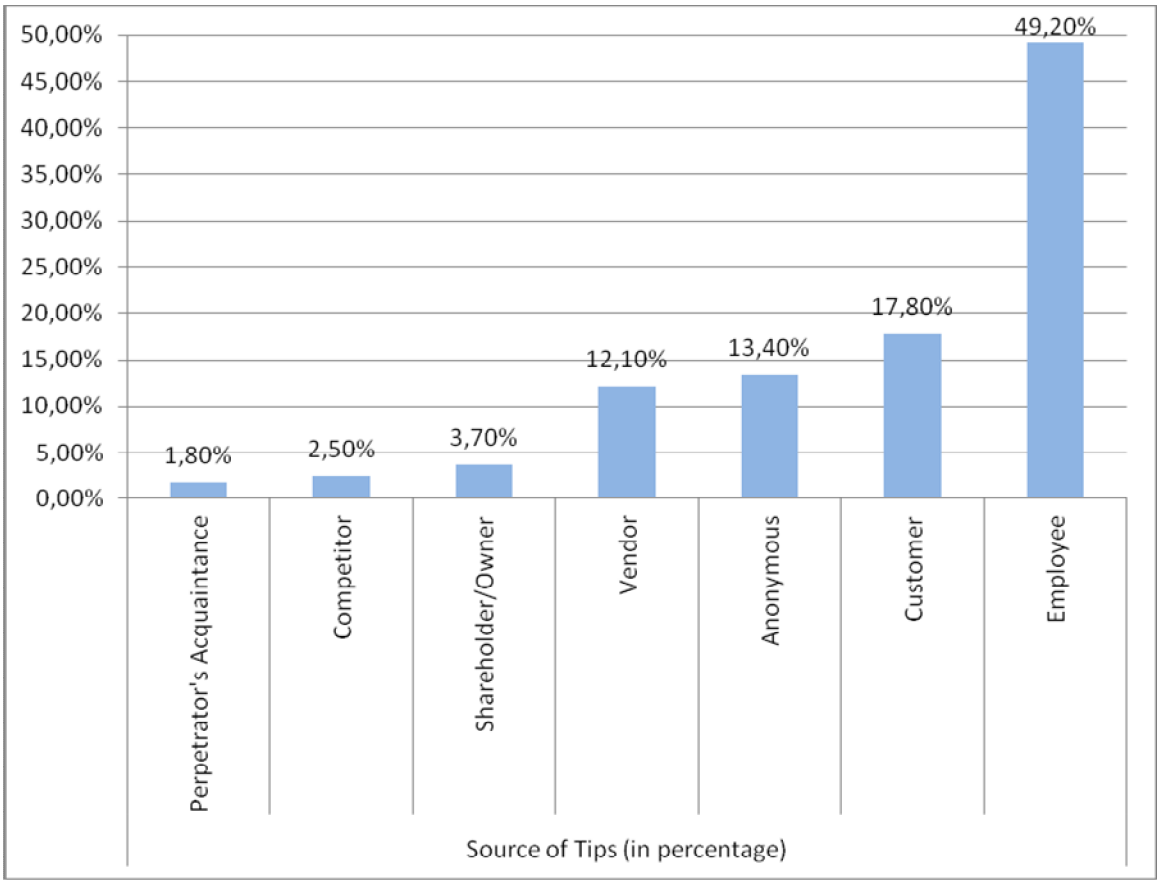
Source: ACFE Report to the Nations 2010

[39] Association of Certified Fraud Examiners (ACFE), *Report to the Nations on Occupational Fraud and Abuse*, Austin (Texas – USA), 2010 Global Fraud Study, p.38

Tips' sources

The ACFE survey of 2010 has also questioned participants about the different kind of sources of tips. The below chart provides an overview of the responses which indicate that most tips come from within the organisations, namely from its employees. Smaller in number but still accountable for over 30% of tips come from external stakeholders such as vendors and customers.[40]

Figure 6 - ACFE Survey: Source of tips



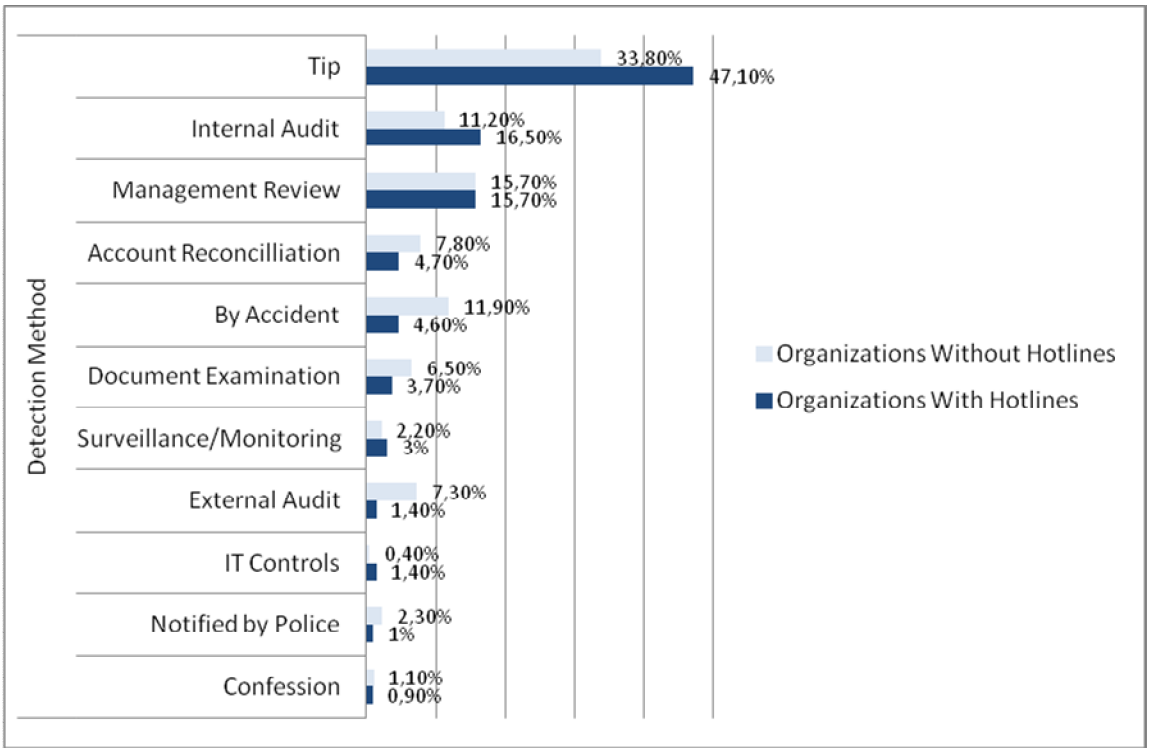
Source: ACFE Report to the Nations 2010

Impact of hotlines

The ACFE survey has also taken into consideration the use and impact of hotlines in organisations. The below chart indicates the different results for organisations with and without hotlines. A preliminary conclusion could be to state that organisations that are well-organised and have a hotline system in place tend to detect fraud sooner and thereby limit fraud losses. Hotlines, however, are a good tool also in organisations that are less open and transparent, since they allow people who are less inclined to disclose potential irregularities, to report. The hotlines can serve as a tool for whistleblowers to report and submit relevant facts whilst remaining anonymous up to a certain extent.[41]

[40] Ibid p.17
[41] Ibid p.17

Figure 7 - ACFE Survey: Impact of Hotlines



Source: ACFE Report to the Nations 2010

The below table presents the reduction of the median losses organisations may suffer through fraud thanks to the implementation of anti-fraud controls. The ACFE survey revealed that hotlines and employee support programmes are amongst the most successful tools to lower the losses. Surprise audits however appear to be very successful as well in reducing the losses due to fraud for organisations. The table shows, however, that surprise audits as such are not that commonly spread or implemented. Throughout the current study we performed we learned that also within the European institutions surprise audits are not commonly spread or performed on a regular basis.[42]

[42] ACFE Report to the Nations 2010, p.42

Figure 8 - ACFE Survey: Median Loss Based on Presence of Anti-Fraud Controls

Control	Percent of Cases Implemented (%)	Control in Place ($)	Control Not in Place($)	Percent Reduction(%)
Hotline	48,60	100.000,00	245.000,00	59,2
Employee Support Programs	44,80	100.000,00	244.000,00	59,0
Surprise Audits	28,90	97.000,00	200.000,00	51,5
Fraud Training for Employees	39,60	100.000,00	200.000,00	50,0
Fraud Training for Managers/Execs	41,50	100.000,00	200.000,00	50,0
Job Rotation/Mandatory Vacation	14,60	100.000,00	188.000,00	46,8
Code of Conduct	69,90	40.000,00	262.000,00	46,6
Anti-Fraud Policy	39	20.000,00	200.000,00	40,0
Management Review	53,30	20.000,00	200.000,00	40,0
External Audit of ICOFR	59,30	140.000,00	215.000,00	34,9
Internal Audit/FE Department	66,40	145.000,00	209.000,00	30,6
Independent Audit Committee	53,20	140.000,00	200.000,00	30,0
Management Certification of F/S	58,90	150.000,00	200.000,00	25,0
External Audit of F/S	76,10	150.000,00	200.000,00	25,0
Rewards for Whistleblowers	7,40	119.000,00	155.000,00	23,2

Source: ACFE Report to the Nations 2010

2.1.2 "The Network"

The Network is an American organisation founded in 1982 whose core business is to provide governance, risk and compliance solutions. The Network performs on a quarterly basis an examination, along with BDO Consulting, of fraud incident reporting. The examination has a global coverage and The Network has noticed a steady increase in the incidents of fraud reported.[43] This could be due to the fact that fraud is more and more considered to be a serious management risk issue that needs to be dealt with.

The results of the examination are published in a report that includes the results of examinations performed worldwide. The 2010 report covers a period from

[43] The Network, *2010 Corporate Governance and Compliance Hotline Bench marking Report*, A Comprehensive Examination of Organisational Hotline Activity from The Network, p 3

2005-2009 and a wide variety of employees and functions are represented, such as customers, vendors, shareholders and other stakeholders of organisations.

The public administration has been just one of the many organisation types and industries that participated in the examination of The Network. The interesting data for the purpose of the underlying study are the data related to the reporting tools most frequently used in the public administration.

The below table indicates that in the public administration there is a great tendency for people to report incidents to other bodies rather than to their own management.[44]

Figure 9 - Prior Management Notification in Public Administration

	2006	2007	2008	2009
Prior Management Notification	16%	18%	18%	18%
No prior management notification	84%	82%	82%	82%

Source: The Network, 2010 Corporate Governance and Compliance Hotline Bench marking Report, A Comprehensive Examination of Organisational Hotline Activity from The Network p 57

2.1.3 The European Ombudsman

As stated earlier the European Ombudsman conducts investigations of complaints regarding alleged instances of maladministration by the EU institutions and bodies. Besides this reactive approach, the European Ombudsman also initiates investigations in order to act more proactively and anticipate potential problems in a way intended to establish a culture of trust. The 2009 Annual Report of the European Ombudsman to the European Parliament reproduces the recent work performed by the European Ombudsman.

The graphs below reflect the high number of inquiries that the Ombudsman carries out each year. Among those inquiries, 84% were introduced by individuals and 16% by companies or associations. The major part of the complaints relate to the European Commission.

Figure 10 - European Ombudsman: Cases dealt with during 2009

Cases dealt with during 2009	
Complaints registered in 2009	3 098
Complaints processed in 2009	**3 119**
Complaints within the competence of a member of the European Network of Ombudsmen	**1 704**
Complaints inside the mandate of the European ombudsman	**727**
Of which	230 inadmissible
	162 admissible but no ground for opening an inquiry
	235 inquiries opened on the basis of

[44] Ibid p 57

	complaints
Inquiries opened on the basis of complaints	**335**
Own initiative inquiries opened	**4**
Inquiries closed	**318**
Of which	182 from 2009 (57%) 80 from 2008 (25%) 56 from previous years (18%)
Source: Annual report 2009 European Ombudsman, p35	

We were informed by the European Parliament that the Ombudsman's own-initiative enquiries are sent to the Parliament. It was stated that in the case of Mr. Tillack the European Parliament, led by Sir Robert Atkins, did not undertake the appropriate actions based upon the Ombudsman's report with regard to the manner OLAF had dealt with this case.

The Annual Report of 2009 of the European Ombudsman also states that a large amount of the maladministration cases in 2009 signal a lack of transparency[45] (36% of the cases).

The European Ombudsman is not investigating fraud cases but is conducting inquiries based on his own initiative or a complaint from an individual or an organisation. He identifies instances of maladministration in the activities of the European institutions, with the exception of the Court of Justice, the Court of First Instance[46] and the Civil Services Tribunal and tries to look for an amicable settlement. If a mutual agreement is not possible or is unsuccessful, he either closes the case with a reasoned decision, which may include a critical commentary, or issues draft recommendations.

2.1.4 OLAF

In 1999, the legislator gave OLAF three main tasks:

- to investigate in full independence fraud against the EU Budget inside and outside the institutions;
- to foster cooperation among the Member States to coordinate their anti-fraud activities;
- to contribute to the development of anti-fraud policies and legislative initiatives.[47]

We refer to the annual reports of OLAF for examples of fraud cases. We have inserted in appendix A.8.1. a document received by one of our interviewees containing statistical information of the last OLAF annual reports. The document analyses the information contained in the annual reports of OLAF regarding reported cases by informants. We note that due to the lack of a clear and sufficient definition of terms such as whistleblowing, whistleblower, informant and

[45] You can find an example of a complaint addressed to the European Ombudsman in Appendix A.13.
[46] The Court of First Instance, also called nowadays "the General Court"
[47] OLAF Annual Report 2010, *Summary*, Tenth Activity Report, 1 January to 31 December 2009, p.4

so on, it is not clear whether the reported figures are complete and correct and thus reflect the actual investigated cases by OLAF.

We also refer to the Parliamentary question to the Commission by Mrs Marta Andreasen on prima-facie non-cases.[48] In 2009 a question was raised to the Commission which answer stated clearly that 26,5% of the information passed to OLAF was evaluated to be prima-facie non-cases and therefore not of concern of OLAF. 'An OLAF Head of Unit may propose to the line Director that information be classified as a 'prima facie non-case'. Directors have to approve and counter-sign a so-called 'Form O6'. Such information will not reach the OLAF Board for assessment'. In the answer formulated by Mr. Šemeta from the Commission he stated that in 2010 17,44% of the cases were categorised as prima-facie non-cases[49]. He states as well that OLAF informed the Commission that Form O6 details certain categories of information about the information sources. The table below gives an overview of these categories between 2008 and 2010.[50]

Figure 11 - Prima Facie Non Case: sources of information

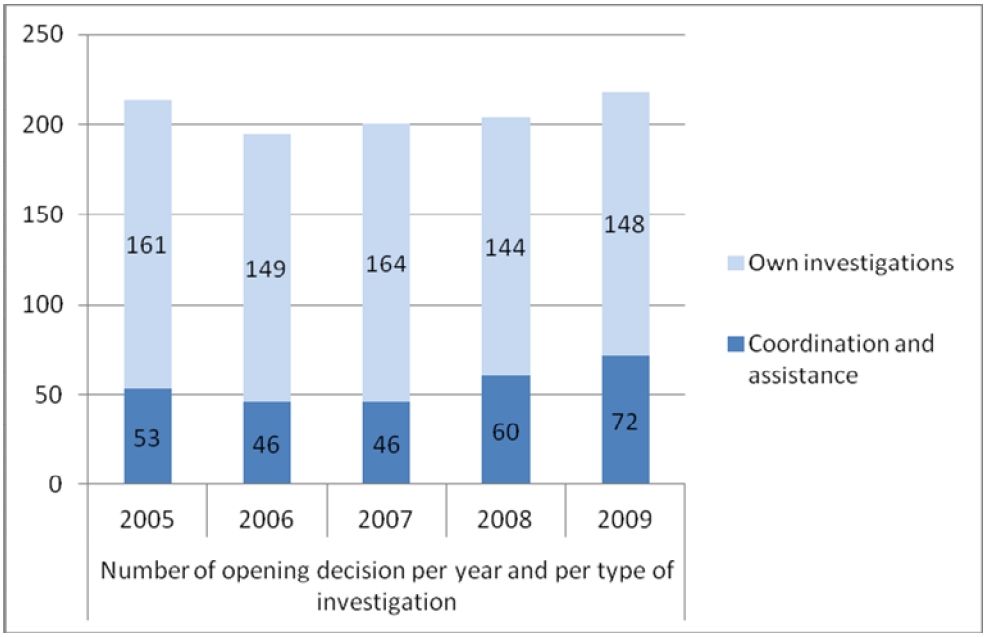
Source	2008	2009	2010
Anonymous source	10	20	18
Formal communication from M.S.	10	3	5
Fraud Notification System			3
Free phone	8	10	13
Informal communication from M.S.	29	9	1
Informants	150	187	103
Information from Commission services	36	39	28
Information from Court of Auditors			1
Information from other EU Institutions	3	4	3
Media		4	
Mutual assistance message			1
Other source	1		
Trade source			1
Total	**247**	**276**	**177**

Source: Annex 1 - EP Question E-00261/2011

The chart below gives us the repartition between investigation types processed by OLAF. It indicates that almost 70% of OLAF's work in 2009 represented own investigations. In the whole year 2009 a total of 220 cases were opened for investigation.

[48] European Parliament, *Parliamentary Question for written answer E-00213/2011 to the Commission*, Rule 117, Martha Andreasen, 24 January 2011
[49] European Commission, E-00213/2011, *Answer given by Mr Šefčovič on behalf of the Commission*, 11.03.2011
[50] It should be noted that figures for 2010 may vary in the next few months due to update of the database for 2010 files. In such a case, OLAF would transmit to the Honourable Member the new figures.

Figure 12 – OLAF's number of opening decisions per year and by type of investigation



Source: European Anti-Fraud Office (OLAF), *Annual Report 2010*, Summary, Tenth Activity Report, 1 January to 31 December 2009 p. 15

According to the 2009 report from the Commission to the Council and the European Parliament entitled 'Protection of the European Union's financial interests -Fight against fraud-Annual'[51], one of the biggest categories of fraud that OLAF has to fight is fraud against the EU's Structural Funds. These funds finance farming, social policy projects and regional development. This report from the Commission presents statistics about ongoing cases as of 31 December 2009 by sector and their financial impact:

'Once a preliminary evaluation has been made of information received, OLAF may open any of the following five types of cases:

- an internal investigation;
- an external investigation;
- a coordination case;
- a criminal assistance case;
- a mutual assistance case.'

The number of cases opened each year is relatively stable (220 in 2009, 204 in 2008 and 201 in 2007). Since 2004, the number of investigations opened by OLAF on its own initiative (internal and external investigations) has first equalled and then exceeded the number of investigations opened by OLAF to provide assistance and coordination to national authorities (coordination cases and criminal

[51] European Commission, *Report from the Commission to the Council and the European Parliament, Protection of the European Union's financial interests-Fight against fraud-Annual*, Report 2009 COM(2010)382 final, Brussels, 14.7.2010

assistance cases). Since 2005, OLAF's own-initiative investigations have accounted for around 75 % of all cases opened. The number of active cases increased from 425 at the end of 2008 to 455 at the end of 2009.' [52]

OLAF performs a great part of its investigations in the EU countries itself, such as Romania, Bulgaria, France and Italy. This does not mean that these countries are more subject to fraud. Instead, OLAF states that the cooperation of local authorities is highly responsible for the number of investigated cases.

The protection rules for the EC are, in practice, not effective to the staff in the agencies. According to OLAF, in the articles 22a and 22b there is insufficient explanation on who is a whistleblower and who should be protected under the cover of a whistleblower. There is a need for harmonization, for explanation of the procedures and clearer explanations on protection. According to the information disclosed during the interviews, it appears also to be more difficult to transfer people who have disclosed potential irregularities and need protection, within the agencies since these entities/institutions are so small. There is simply no room for transfers. There is no ethical network within the agencies, so in practice these staff members do not have any other possibility than to turn to OLAF. Many of these cases reported to OLAF relate to harassment or 'vendettas'. Therefore these cases do not fall under the responsibility of OLAF.

Within the EU institutions it is OLAF's responsibility to investigate serious cases. The objective of the investigations is to detect fraud, corruption and any other illegal activity affecting the financial interests of the EU. Through its investigations OLAF has to gather the necessary evidence to support these cases. The investigations can go beyond fraudulent activities and focus on other breaches as well, such as breach of professional duties by officials. Within the EU institutions it is claimed that a zero-tolerance policy is strictly adhered to.

We requested OLAF to provide us with statistics or information on cases, but due to the high degree of confidentiality of these cases OLAF has not been able to provide such information.

Throughout the interviews we learned that people from the staff are still not knowledgeable about OLAF and the Fraud Notification System. OLAF needs to help to promote this idea and to make known that people can go to OLAF. Top management, especially in the agencies, should be aware of the system and the advantages since, up to now, top management was mainly inclined to investigate themselves first, thereby contaminating and damaging a lot of potential evidence.

2.2 CASE STUDIES

The focus of our study lies with whistleblowing cases related to conflicts of interest and corruption. In the course of our study we received, on more than one occasion, the request to talk to persons who disclosed other types of incidents, such as harassment. We have met several whistleblowers in the course of our study and have agreed to keep our focus as it was defined at the beginning. In

[52] Ibid, p.16-17

addition we will not disclose or reveal the names of persons we talked to or whom we interviewed for the sake of this study. Therefore one will not find reference to any name nor will we discuss the content of discussed cases because this would seriously increase the risk of exposing our interviewees.

For this section we have opted to analyse known and well-established cases. For this reason the names and content of the cases can be revealed and discussed in this report, contradictory to the whistleblowers we talked to on a confidential basis (see above). These 8 whistleblowing cases occurred within the European Institutions for the period from 1998 until the present.

1. Marta Andreasen (European Commission / DG Budget)[53];
2. Bart Nijs (European Court of Auditors);
3. Christine Sauer (European Commission / DG JRC);
4. Robert McCoy (European Committee of the Regions);
5. Dougal Watt (European Court of Auditors);
6. Dorte Schmidt-Brown (European Commission / DG Eurostat);
7. Paul van Buitenen (European Commission / DG Financial Control);
8. Guido Strack (European Commission / DG OPOCE).

From the 7 remaining cases, 3 have brought their case before the European Court of Justice, which are:

1. Bart Nijs (European Court of Auditors);
2. Dorte Schmidt-Brown (European Commission / DG Eurostat);
3. Guido Strack (European Commission / DG OPOCE).

In appendix A.10, the full summary of these 3 cases has been included. Below we have included tables summarizing the outcome and our conclusions on the cases of Bart Nijs, Dorte Schmidt-Brown and Guido Strack. These analyses include actions up through 31 December 2010; conclusions or appeals made after that date are not included in the analysis. In addition we have added conclusions drawn from interviews held with other persons who disclosed issues within the European institutions and agencies.

We note the following facts:

- That the duration of the cases, following claims and court decisions takes more than a reasonable amount of time[54];
- That in these cases very few – if any – reference is made to the articles 22a and 22b of the Staff Regulations;
- That many claims or requests are dismissed without clear and defendable argumentations or often on pure procedural grounds;

[53] As agreed upon with the European Parliament, we have decided not to study the case of Mrs Marta Andreasen, first because she spoke out following the rules of the chief accountant and not because of Article 22a Staff Regulations and second, since this might cause a conflict of interest considering the fact that Mrs Andreasen was appointed the rapporteur of this study.
[54] Which is a violation of article 6 of the European Convention on Human Rights

- That many informants or whistleblowers who have the courage to come forward, are perceived as 'troublemakers'. All eight whistleblowers were either fired or were placed on invalidity leave;
- That whistleblowers had to build up courage before they actually decided to disclose. The reason mentioned was mainly the fear of retaliation and the fear of not receiving due protection.

Below we will give an overview of all three cases and highlight the most important findings:

Dorte Schmidt-Brown v Commission:

Mrs. Schmidt-Brown was working for Eurostat when she raised concerns about a certain contractor. A few months later, she was transferred to a department which had no dealings with the contractor. After an internal audit report, Mrs. Schmidt-Brown was placed on temporary sick leave. She launched several internal complaints and also sued for a libel action against the contractor, for which she requested assistance from the Commission. Finally, Mrs. Schmidt-Brown was placed on retirement and receives an invalidity pension. She brought two cases before the European Court of Justice, an initial action and an appeal:

Figure 13 - Cases of Schmidt-Brown

Case Schmidt-Brown

Case No.	Application Date	Judgement / Order Date	Main Request	Main Argument	Reference to Art. 22a / 22b	Outcome
T-387/02	13/12/2002	05/07/2005	* Assistance in legal proceedi	* Art. 24 Staff Regulatior	No	* Claims dismissed
C-365/05 P	28/09/2005	05/10/2006	* Appeal Case T-387/02	* Alleged misinterpretatio	No	* Appeal dismissed

Source: PwC Analysis

The two cases Mrs. Schmidt-Brown brought before the European Court of Justice related to her request for assistance and the rejection thereof. She did not initiate any proceedings before the Court of Justice related to her transfer, her sick leave or her invalidity leave. So although there have been clear consequences for Mrs. Schmidt-Brown's actions, she has not contested them before the European Court of Justice. Therefore, the Court has not ruled on the protection of whistleblowers.

Guido Strack v Commission:

Mr. Stack had been working at the Publications Office of the European Union for five years when he expressed complaints about a contract with a contractor. After he left the Publications Office, he informed OLAF about some questionable practices. OLAF launched an investigation, but afterwards decided not to pursue the case because they did not find any irregularities. Although Mr. Strack urged the director of OLAF to reconsider, the decision was final. After he blew the whistle, Mr. Strack received negative performance evaluations, didn't receive promotions and his candidacy for another position was rejected. In the end, he was also placed on invalidity leave. Both parties brought a total of sixteen cases before the European Court of Justice (fifteen by Mr. Strack and one by the European Commission):

Figure 14 - Cases of Guido Strack

Case No.	Application Date	Judgement / Order Date	Main Request	Main Argument	Reference to Art. 22a / 22b	Outcome
T-85/04	01/03/2004	30/01/2008	* Annul performance evaluation	* Violation principle of equal treatment	No	* Performance evaluation annuled
T-394/04	05/10/2004	30/01/2008	* Cancel promotion decision(s)	* Decision based on contesed evaluation	No	* Promotion decision(s) cancelled
T-4/05	04/01/2005	22/03/2006	* Annul OLAF's decision	* Deprivement status whistleblower	Yes	* Claim declared inadmissible * On 15/12/2005 Case T-225/05 was renumbered to F-44/05
F-44/05		25/09/2008	* Annul decisions related to his unsuccesful candiday	* Alleged irregularities / infringements		*Annulment of rejection candidacy
T-225/05	17/06/2005	15/12/2005	* Annul rejection occupational illness	* Delay in communication	Yes	* 2000 EUR compensation
F-37/06	10/04/2006	06/12/2006		* Illness due to harrassement	No	* Claim declared inadmissible
C-237/06 P	28/05/2006	08/03/2007	* Appeal case T-4/05	* Procedural errors / misinterpretations	Yes	* Appeal dismissed
T-392/07	12/10/2007	/	* Access to documents	* Infringement Art. 255 EC	No	* Case still pending on 31/12/2010
F-118/07	22/10/2007	/	* Claim for damages	* Aministrative errors / unlawful acts	No	* Case still pending on 31/12/2010
F-119/07	22/10/2007	/	* Various claims	* Various arguments	No	* Case still pending on 31/12/2010
F-120/07	22/10/2007	/	* Transfer of leave days	* Art. 4 of Annex V Staff Regulations	No	* Case still pending on 31/12/2010
F-121/07	22/10/2007	/	* Access to documents	* Breach duty to care / sound administration	No	* Case still pending on 31/12/2010
F-132/07	30/11/2007	/	* Publish documents	* Art. 17, 17a & 19 Staff Regulations	No	* Case still pending on 31/12/2010
T-221/08	06/06/2008	/	* Access to documents	* Art. 253 EC & 255 EC	No	* Case still pending on 31/12/2010
T-526/08 P	03/12/2008	09/12/2010	* Appeal case F-44/05	* No vested and present interest	Yes	* Judgment partially annulled * Case reopened as F-44/05 RENV
F-61/09	25/06/2009	30/11/2009	* Access to documents		No	* Case suspended
F-62/09	26/06/2009	08/09/2010	* Claim for damages	* Failure to comply to T-85/04 & T-394/04	No	* Case settled

Source: PwC Analysis

In four cases a reference was made to article 22a or 22b of the Staff Regulations (case T-04/05 and case T-225/05 and the appeals thereof in case C-237/06 P and case T-526/08 P). In case T-4/05, Mr. Strack referred to article 22a to support his claim that OLAF's decision not to pursue the case had a legal and binding effect on him. He claimed that whistleblowers should be protected under the Staff Regulations and these protective measures would be meaningless if the Court would conclude that OLAF's decisions did not have legal effects. He claimed that although OLAF didn't pursue the case, he still should receive the same protective measures as if OLAF would have further investigated the case. He added that by refusing equal treatment, it would appear as if his accusations were false. The Court concluded that OLAF's decision didn't affect Mr. Strack's legal position. However, the Court stressed that although OLAF didn't pursue the case, he was still protected under article 22a and 22b. Thus, the Court stated that whistleblowers should be protected under these articles, regardless what the outcome of their case might be.

In case F-44/05, Mr. Strack also referred to article 22a in his request for the annulment of the decision to reject his candidacy. Some of the people that Mr. Strack accused of wrongdoings were involved in the selection procedure in which he participated. He claimed that this should be regarded as a prejudicial effect

from which he suffered. However, the Court argued that the link between the rejection of his candidacy and his allegations wasn't established and therefore rejected his claim.

In case C-237/06 P - which was an appeal against case T-04/05 – Mr. Strack claimed the Court wrongfully interpreted 'an act adversely affecting him' and also misinterpreted article 22a and 22b of the Staff Regulations. He put forward three arguments related to articles 22a and 22b of the Staff regulations: 1) he argued that the non-compliance of the disclose requirements in acticle 22b should have led to the admissibility of his appeal against the contested decision, 2) he argued that OLAF didn't take 'appropriate actions' as prescribed by article 22b and 3) that the failure to consider procedural irregularities were an infringement against article 22a paragraph 3 of the Staff Regulations. As did the Court in First Instance, the Court in the current case stressed that Mr. Stack was protected by articles 22a and 22b of the Staff Regulation, but this protection didn't automatically mean there was an act adversely affecting him. Regarding the first argument Mr. Strack put forward, the Court concluded that the failure of the purely formal act to inform Mr. Stack couldn't be considered as an act adversely affecting his legal position. Regarding the second argument, the Court argued that Mr. Stack didn't provide evidence that OLAF didn't take the appropriate measures as described in article 22b of the Staff Regulations. Also the third argument was rejected because the Court concluded this still didn't lead to 'an act adversely affecting him'. The Court dismissed the appeal and affirmed the outcome of case T-04/05.

In case C-526/08 P – which was an appeal against case F-44/05 - , it wasn't Mr. Strack who initiated the legal proceeding, but the European Commission. However, Mr. Strack also contested the judgment in case F-44/05. In one of his arguments, he referred to article 22a of the Staff Regulations. He claimed that the Court reversed the burden of proof and that the judgment was based on a too restrictive interpretation of the article. This argument was rejected by the Court.

The Court's decision in case T-4/05 and its appeal in case C-237/06 P regarding the extent of article 22a could be considered a strong statement. The Court concluded that even though OLAF didn't pursue a case that was initiated by a whistleblower, he or she still should receive the same protection as if were the case. However, the Court's decision in case F-44/05 and its appeal in case C-526/08 P placed the burden of proof with the whistleblower, which makes it almost impossible for him to prove the sufferance of prejudicial effects.

In the appendices the cases of Mr Strack are discussed in detail, although we do note that the information contained is derived solely from the published decisions of the EU Courts.

Bart Nijs v Court of Auditors:

Mr. Nijs, a translator for the Court of Auditors, reported on blackmailing and the misuse of the European Community's invalidity scheme. An administrative investigation was launched against Mr. Nijs, he was suspended and later demoted

to a lower grade. In total, Mr. Nijs brought sixteen actions against the Court of Auditors:

Figure 15 - Cases of Bart Nijs

Case No.	Application Date	Judgement / Order Date	Main Request	Main Argument	Reference to Art. 22a / 22b	Outcome
T-377/04	16/09/2004	26/05/2005	* Annul promotion decision	* Errors in decision	No	* Claims dismissed as inadmissible
T-171/05	02/05/2005	03/10/2006	* Annul promotion decision	* Errors in decision	No	* Annulment promotion decision / in part inadmissible
C-373/05	10/10/2005	22/01/2007	* Appeal case T-377/04	* Wrongful dismissal	No	* Appeal dismissed as unfounded
F-49/06	09/05/2006	09/10/2008	* Annul promotion decision	* Various arguments	No	* Claims dismissed as unfounded / inadmissible
C-495/06 P	01/12/2006	25/10/2007	* Appeal case T-171/05	* Wrongful dismissal	Yes	* Appeal dismissed as unfounded / inadmissible
F-5/07	21/01/2007	26/06/2008	* Various claims	* Various arguments	No	* Claims dismissed as unfounded / inadmissible
F-108/07	15/10/2007	26/06/2008	* Annul appointment Secretary General	* Failure notification OLAF	No	* Claims dismissed as inadmissible
F-136/07	06/12/2007	26/06/2008	* Annul demotion decision		No	* Claims dismissed as inadmissible
F-1/08	02/01/2008	26/06/2008	* Annul evaluation report		No	* Claims dismissed as unfounded / inadmissible
F-64/08	29/07/2008	18/12/2008	* Annul appointment reporting officer		No	* Claims dismissed as inadmissible
T-371/08 P	08/09/2008	22/06/2009	* Appeal case F-5/07	* Various arguments	No	* Appeal dismissed as unfounded / inadmissible
T-375/08 P	10/09/2008	09/09/2009	* Appeal case F-108/07	* Various arguments	No	* Appeal dismissed as unfounded / inadmissible
T-376/08 P	10/09/2008	22/06/2009	* Appeal case F-1/08	* Various arguments	No	* Appeal dismissed as unfounded / inadmissible
F-98/08	11/12/2008	02/07/2009	* Annul promotion decision	* Errors in decision	No	* Case dismissed as unfounded / inadmissible
T-567/08 P	19/12/2008	17/12/2009	* Appeal case F-49/06	* Various arguments	No	* Appeal dismissed as unfounded / inadmissible
F-77/09	14/09/2009	/	* Annul decision to remove him			* Case still pending on 31/12/2010

Source: Pw C analysis

Most of these cases were related to contested promotion decisions. Even though these actions could have been a result of Mr. Nijs' decision to blow the whistle, only one explicit reference was made to article 22a or 22b of the Staff Regulations, this was in Case C-495/06 P (appeal of Case T-171/05). Mr. Nijs claimed that the decision not to promote him should have been considered as a disguised sanction, which is prohibited under article 22a of the Staff Regulations. However, the Court rejected this argument.

Remarks

After analysis of the three whistleblowing cases, a few general remarks can be made:

- Even though a lot of actions related to the above-mentioned 3 cases were brought before the European Court of Justice, there have only been five actions in these 3 cases where there was a reference to the whistleblowing-provisions in the Staff Regulations;
- It appears through our analysis of these 3 cases that the implementation and consequences of the applicable provisions are not automatically assessed;

- If whistleblowing cases do end up before the Court, it is never about the whistleblowing itself, but about the aftermath. The actions are almost exclusively related to procedures and not to the content;
- In the first instance, the whistleblowers tried to enforce their rights using existing articles in Staff and other Regulations. Although there are a lot of regulations in place, it seems very difficult to enforce them (cf.: Access to documents). It also takes a long time for a Court to rule on the case;
- Success rate is very low.

3 COMPARISON OF THE WHISTLEBLOWING PROCEDURES

Disclosing wrongdoing has become a growing concern in many countries inside and outside the European Union. Member States have different approaches on disclosure and there is, until now, no harmonized European legislation on the matter. In addition we need to add that a clear distinction should be made between international organisations and countries, since whistleblowers in international organisations do not have recourse to national courts.

To develop this section, we first identify the maturity[55] level of each European country regarding whistleblowing and, when applicable, the whistleblower protection legal framework currently in force. This general overview of the national whistleblowing legislation then allowed us to categorise European Member States in function of their development level towards their specific legislation on the protection of whistleblowers currently in force.

A short questionnaire[56] on whistleblowing was addressed to members of the Council of Europe by the Secretariat of the Parliamentary Assembly of the Council of Europe. Results clearly revealed that the majority of European countries do not currently have nor do they plan to introduce specific legislation on the protection of 'whistleblowers'.

The questionnaire mentioned above contained 4 questions and was sent to national parliaments' libraries in September 2007. The chosen countries are:

- Belgium;
- France;
- Germany;
- Netherlands;
- Romania;
- United Kingdom (UK).

Most of the European whistleblowing legislation is quite recent, with the United Kingdom as the European precursor and model in the field.

Although Germany does not have a comprehensive whistleblowing system, we concluded it was important to include this country in our selection considering the size and financial power that it represents within the EU and the world.

[55] Development level regarding whistleblowing legislation passed in a country

[56] Four questions addressed by the Secretariat of the Parliamentary Assembly, in September 2007, through the European Centre for Parliamentary Research and Documentation (ECPRD), to the research services of the parliaments of most of the member states of the Council of Europe and to the Congress of the United States of America. For questions details, see p.7 of the Doc 12006 of the Parliamentary Assembly of the Council of Europe on the "Protection of whistle-blowers" from the 14th of September 2009

The countries that answered to this questionnaire were classified into 3 categories:

- Countries that have specific legislation on the protection of 'whistleblowers'[57] (**Belgium**[58], **France**, Norway, **Romania**, the **Netherlands** and the **United Kingdom**);
- Countries that have developed a draft legislation on the protection of 'whistleblowers' and that is pending in parliament or that is still or was under preparation[59] (Slovenia, Switzerland; in Lithuania, a far-reaching draft law on the matter has been rejected by parliament);
- Countries that have no specific legislation but where some protection for 'whistleblowers' is provided by various statutory provisions, in particular, labour and criminal law (Austria, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Denmark, Estonia, Georgia, Greece, Italy, Poland, Serbia, Slovakia, Sweden, 'the former Yugoslav Republic of Macedonia' and Turkey).[60]

We first compared the publicly available information of the 27 European countries in order to understand the 'maturity level' of each European country regarding whistleblowing and the whistleblower protection rules. For this purpose, we have prepared an Excel table (see below and appendix A.3 - A.5) listing key elements that should be integrated in any whistleblowing system. This table has been filled in with recent publicly available information enabling us to better picture the position of each of these countries towards whistleblowing and the reporting and disclosure of perceived wrongdoings. According to our analysis and the numerous papers and studies comparing the European status towards whistleblowing[61], we have concluded that the current European legal framework in can be characterised by a dual problem which are 'fragmentation' (no uniform legislation) and 'ambiguity' (no clear definitions). It is important to note that the national legislation does not apply to employees of international organisations which are benefiting from a different legal status.

[57] Countries in 'bold' will be further analysed in this study
[58] For the Flemish part of Belgium only
[59] During the G20 summit of November 2010 in Seoul, G20 countries members mentioned that enacting and implementing whistleblowers protection rules will help the fight against corruption. The G20 countries committed themselves to enact and implement whistleblower protection rules by the end of 2012. For more information, see http://media.seoulsummit.kr/contents/dlobo/E5._ANNEX3.pdf
[60] Council of Europe, Parliamentary Assembly of the Council of Europe (PACE), *The Protection of "Whistleblowers"*, report from the Committee on Legal Affairs and Human Rights, Explanatory memorandum by Rapporteur: Mr Pieter OMTZIGT, The Netherlands, Group of the European People's Party, Doc. 12006, Strasbourg, 14 September 2009
[61] For the complete list of references used, please see references quoted in the bibliography section

Figure 16 - Key features used to compare whistleblowing rules between countries

Key elements of a whistleblowing system	Description
1. Legal situation / National law	**What is foreseen in the national law? Is there any specific whistleblowing legislation?**
Precisions (public sector)	Does the national law apply to the public sector? Some precisions on rules applicable to the public sector.
Precisions (private sector)	Does the national law apply to the private sector? Some precisions on rules applicable to the private sector.
Private / public sector	Clear mention of the population targeted by the national legislation: Public and / or Private?
2. Authorities in charge	**Which are the internal / external reporting channel(s) foreseen in the legislation?**
3. Definitions	**Is the law clearly defining what is whistleblowing / a whistleblower?**
4.Whistleblower and whistleblowing procedure	**Precisions regarding national reporting / whistleblowing provisions**
Implementation of hotlines	Procedure and authorisation's entity for data processing and mention of guidelines when applicable.
Scope? (corruption only or other wrongdoings)	What is the scope of the national legislation? Does is concern reporting of wrongdoing related to corruption only or to other types or wrongdoing too?
To whom? (reporting)	Reporting options.
Obligation?	Is it a duty to report?
Confidential and anonymous?	Anonymous and / or confidential reporting?
Civil Servant Secret?	Is there an obligation to public sector employees to keep information secret?
External disclosures	Is an external disclosure possible? If yes, to whom?
Protection against dismissal?	Is the whistleblower protected against dismissal? (Foreseen in the rules?)
Protection against retaliation?	Is the whistleblower protected against retaliation? (Foreseen in the rules?)
Data retention / destruction	While processing data, does the law foresee a data retention / destruction period?
Retaliations' sanctions	Does the law foresee any sanction in case of retaliation?
Compensation / Reward	Does the law foresee any compensation or reward to a whistleblower?
Sanctions for misguided or false	Does the law foresee any sanction against

reporting	malicious and / or misguided or false reporting?
5. Practical data	**Is there any national statistical information available?**
Number of whistleblowers	Is statistical information available regarding the number of whistleblower?
Investigated / Reported cases' number?	Is statistical information available regarding the number of investigated and / or reported cases?
6. Other	**Other important elements of a whistleblowing system**
Right to refuse to violate the law	Does the national law foresee 'a right to refuse to violate the law'?
The TI Corruption Barometer or other surveys	Does other statistical info exist? (such as stats from TI Corruption Barometer)
Remark	Is there any additional piece of information relevant to add?
Cases	Examples of national cases
Weaknesses	Can we identify the/some system's weaknesses?
7.International treaties	**Adherence to international treaties?**
UN - Signatories of the UN Convention Against Corruption (UNCAC) http://www.unodc.org/unodc/en/treaties/CAC/signatories.html	Is the selected country 'signatory' of the UNCAC?
Council of Europe - Civil Law Convention on Corruption	Is the selected country 'signatory' of the CoE Civil Law Convention on Corruption?
Council of Europe - Criminal Law Convention against Corruption	Is the selected country "signatory" of the CoE Criminal Law Convention against Corruption?
ILO-158	Is the selected country "signatory" of the ILO-158?
OECD	Is the selected country 'signatory' of the OECD?
Recommendations	**Can we already identify some recommendations?**

Source: PwC Analysis

Our goal is to retrieve the most relevant information (through key elements) of the selected 'mature' countries regarding whistleblowing regulation and whistleblower protection. This information will help us understand the progress level, the developments and the common weaknesses of the selected nations.

3.1 COMPARATIVE FACTORS

As previously mentioned, we have selected some key criteria to get a better 'picture' of the development level of our European countries towards whistleblowing regulation and whistleblower protection. It will confirm that even the most developed countries do not dispose of a perfect whistleblowing system. A whistleblowing system is the result of an extensive implementation that needs to be re-evaluated continuously.

3.1.1 Scope of a whistleblowing program

The situation in the five countries with specific legislation on the protection of 'whistleblowers' differs widely: in most cases, the protection of 'whistleblowers' is only applicable to cases of corruption and does not cover other irregularities.[62] France, for example, covers only corruption. The UK, by contrast, has a much broader coverage including criminal offences, risks to health and safety, failure to comply with a legal obligation, a miscarriage of justice and environmental damage.

A whistleblower protection system should not be limited to the reporting of corruption cases only but should be broadened to include the reporting of other illegal activities (and in the context of this study, with an emphasis on EU funds mismanagement cases, corruption and conflict of interest).

3.1.2 Legislation and definition

At first glance, we could directly observe that there is no specific whistleblowing legislation in most of the EU Countries. Some protection mechanisms exist but the rules are fragmented and are not intended specifically to protect whistleblowers. Countries do not all provide a definition of what a whistleblower is, which, consequently, does not provide the foundation for an efficient whistleblowing system. While the United Kingdom is well aware of the need to protect whistleblowers, thus enhancing early risk detection, in many other European countries (e.g. in Germany), this awareness, and consequently the implementation of a specific whistleblowing legislation, is still lacking.

Based on the information gathered from our numerous lectures, from our key factors comparison, from answers given by the European countries to the questionnaire of the Council of Europe[63], and from our European countries comparison based on the above-mentioned key elements, we have selected six European countries[64] to be considered in greater detail in this study.

3.1.2.1 Sector (public and/or private)

Laws often do not cover both the private and the public sector (e.g. Belgium and Romania where the whistleblowing legislation applies to the public sector only). The public sector is, in general, the first stakeholder taken into consideration while implementing regulation to settle issues relating to the reporting of unethical

[62] Ibid
[63] Ibid
[64] Belgium, France, Germany, the Netherlands, Romania, and the United Kingdom

behaviour. No matter the political orientation of a country, the public sector is functioning with public funds. Because of this, the public sector has a public responsibility vis-à-vis their funds management. This view does not only concern public employees but includes every stakeholder dealing with the public sphere, such as outside vendors, contractors and any individual who can participate in and even encourage government corruption.

Whistleblowing regulation in the private sector mostly concerns big companies that have implemented a specific whistleblowing system in order to be SOX (Sarbanes-Oxley Act of 2002 in the United States of America) compliant after the financial scandals of Enron and Worldcom. In fact, the most famous whistleblowers in recent history (e.g. Sherron Watkins from Enron and Cynthia Cooper of Worldcom) worked in the private sector and helped expose corruption in these companies, which eventually led to the creation of the Sarbanes-Oxley Act. But the majority of European companies are national, small or medium in size[65] and are, as a result, out of scope of SOX regulation.

The first companies that implemented SOX in Europe organised anonymous hotlines to meet the US requirements in the framework of fraud detective measures. These companies have been confronted with 'unconformity' with Europe's position about data protection and privacy. The common legal framework that every European country must take into account is the 'Data Protection Directive 95/46/CE' passed in 1995. This directive governs the collection, processing and transfer of personal information within Europe - defined in its Articles 2, 3 and 4. 'The implementation of 'whistleblower' systems as part of a code of conduct often requires the processing of personal data (collection, registration, storage, disclosure and destruction of data relating to an identifiable person) and require that data protection rules come into force'. Without a resolution to this cross-border dispute over the implementation of codes of conduct, companies face the possibility of heavy sanctions in both Europe and the United States. An EU committee set up for the purpose of examining the implementation of data protection law (by 'the Article 29 Data Protection Working Party') investigated the problem of the United States' requirement clashing with Europe's data protection rules.'[66]

Since then, some local guidelines (e.g. in Belgium, France, Germany and the Netherlands) have been released to facilitate the application of the Directive regarding the implementation of SOX whistleblowing hotlines.

[65] *The Act applies to US public companies and their global subsidiaries and from June 2005 it will also apply to any foreign company whose shares are traded on the US stock exchange and those who are contemplating such a listing.* Source: European Association of Communications Agencies

[66] Wisskirchen G., *Introduction of Whistleblower Systems in the European Union*, Defense Counsel Journal, Jul 2010

Moreover, the opinion[67] issued in 2006 by 'the Article 29 Data Protection Working Party' assessed conditions to justify the gathering and the processing of personal data which covers transparency, legitimate purpose and proportionality aspects.

3.1.2.2 Definition of whistleblowing

Except for Romania which took the challenge to establish an official definition of whistleblowing in its legislation, it appears that no single country included in this analysis maintains an official definition on that topic. It is important to note that this Romanian definition seems to be essentially oriented towards the public sector.

There is a large range of 'competing' definitions, and, at present, no official legal definition of whistleblowing or whistleblower exists. However, we noticed that numerous researches and studies refer to 'Near & Miceli 1985' who defined whistleblowing as the *'disclosure by organisation members (former or current) of illegal, immoral or illegitimate practices under the control of their employers, to persons or organisations that may be able to effect action.'*[68] Considering the fact that the 2008 book refers to the definition that first appeared in the 1985 book and that most of the documentation analysed in the course of this study referred to the definition appearing in the book of 1985, we here refer to the initial definition that appears in the book of 1985.

The explanatory memorandum by rapporteur Mr Omtzigt, member of the Parliamentary Assembly of the Council of Europe[69], refers to the definition used by the British Non Governmental Organisation (NGO) 'Public Concern at Work' describing whistleblowing as *'Alerting the authorities to information which reasonably suggests there is serious malpractice, where that information is not otherwise known or readily apparent and where the person who discloses the information owes a duty (such as an employee's) to keep the information secret, provided that wherever practicable he or she has raised the matter within the organisation first.'*

3.1.3 Confidential or anonymous?

European countries are currently sharing a common approach in this matter. They are not in favour of anonymous reporting but are sometimes exceptionally authorizing it under strict conditions and with high precautions. *'Romanian law, for instance, gives officials the right to have their identity withheld when denouncing a superior.'*[70]

[67] *Article 29 Data Protection Working Party, Opinion 1/2006 on the application of the EU data protection rules to internal whistleblowing schemes in the fields of accounting, internal accounting controls, auditing matters, fight against bribery, banking and financial crime*, Adopted on 1 February 2006, 00195/06/EN, WP 117
[68] Miceli, Near & Dworkin, *Whistle-blowing in Organisations*, Routledge, 2008, p.6
[69] Council of Europe, Parliamentary Assembly of the Council of Europe (PACE), *The Protection of 'Whistleblowers'*, report from the Committee on Legal Affairs and Human Rights, Explanatory memorandum by Rapporteur: Mr Pieter OMTZIGT, The Netherlands, Group of the European People's Party, Doc. 12006, Strasbourg, 14 September 2009, §17
[70] Speckbacher C., *The protection of whistleblowers in the light of GRECO's work*, Secretariat of GRECO, 20 March 2009

A fully anonymous disclosure is hard to realise in practice. In some cases the specific description of the facts and the provided data is so unique that it does not require a lot of work to identify the disclosing person(s). This is a problem that is widely recognized, but also one that is hard to solve in practice.

Even if the whistleblower status may have evolved in some countries like in the US where they have been sometimes hailed as heroes (e.g.: even though Sherron Watkins (Enron), Coleen Rowley (FBI) and Cynthia Cooper (WorldCom) were elected 'Persons of the Year' by the Time Magazine in 2002, they are now representing the emblematic picture of courageous whistleblowers) or as workplace integrity icons, most of them face severe reprisals and negative repercussions (e.g. career freezing, firing, blacklisting from their company, difficulties in finding another job, public humiliation, isolation, physical danger, etc.).[71]

It is essential to use a correct vocabulary and to clearly differentiate confidential information from anonymous information. 'Anonymous' means that the person prefers to keep his identity hidden while 'confidential' means private, secret, not universally available or known only to a selected group of people.

These terms relate to an individual's participation in a whistleblowing procedure and classify ways to collect and maintain information for analysis.

3.1.3.1 Confidentiality

A privacy law exists in most countries in order to regulate the type of information which may be collected and how this information may be used and stored. *Unlike the sectoral approach to privacy favoured by US lawmakers, privacy is considered a fundamental human right in Europe*[72] where data protection is crucial for European regulators. The legal basis of topics related to privacy for each European Member States is the EU Data Protection Directive[73] and the Directive on Privacy and Electronic Communication.[74] The implementation of a whistleblowing system implies the processing and potentially the transfer of personal data and therefore falls within the scope of the above-mentioned directive.

As mentioned by the European ombudsman, the internal policy, law or directive should let whistleblowers keep their identity confidential as far as possible and at least list the following elements:

- Fact of the disclosure;
- Identity of the whistleblower; and
- Allegations (including individuals' names).

Sometimes it could be possible to keep all three listed elements confidential and manage the disclosed case effectively. This would provide the most effective

[71] Information obtained from the confidential interviews we had during the study
[72] The Law Journal Newsletters, *The Privacy & Data Protection*, Volume 1, Number 3, April 2006
[73] Directive 95/46/EC
[74] Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002

protection for a whistleblower. In reality, however, confidentiality cannot be guaranteed at all times. Through investigating some allegations one can sometimes draw the attention of persons in the organisation thereby jeopardizing the confidentiality. Additionally the person accused of the irregularity should always have the right to look at the disclosed case and be able to defend himself. Once it is known that an internal disclosure has been made, it is often not difficult to find out who has blown the whistle. Management of this kind of cases therefore should work proactively in order to protect whistleblowers.[75]

It is essential to keep in mind that past experiences often show that the probability that the identity of the whistleblower will remain forever undisclosed cannot always be guaranteed in practice. Furthermore, the whistleblower has sometimes made confidentiality even more difficult by previously transmitting his concerns about an issue, or his intention to complain, before making a formal disclosure. These elements reinforce the necessity to use effective / efficient whistleblower protection rules.

3.1.3.2 Anonymity

Because the whistleblower discloses information regarding wrongdoings that some people do not want to hear about nor admit, the information should be treated confidentially or anonymously. Sources are anonymous only when the name of the disclosing person is not revealed to the person in charge to take the complaint. Any person who does not give a name must be recorded as an anonymous source, even if the person receiving the complaint thinks he/she recognizes the source's identity. The anonymity concept implies that there is no official link between the whistleblower and the disclosed information. It is however important that one always keeps in mind the fact that in practice it could be relatively easy to find out who blew the whistle (due to the very specific and unique character of the provided data and evidence material).

3.1.4 External disclosure

External disclosure is foreseen in all of the selected countries with the exclusion of Romania. Once the whistleblower has addressed the issue to all foreseen internal channels and no appropriate action was undertaken, then one can turn to external channels.

In Romania article 6 of the Whistleblower Protection Act[76], covers internal and external disclosure to judicial bodies, professional organisations, unions, parliamentary commissions, mass media, and governmental organisations.

3.1.5 Protection of whistleblowers

This issue is of international interest as all countries and organisations struggle to protect the courageous workers who seek to protect the public interest. The European institutions currently protect whistleblowers only under specific conditions.

[75] NSW Ombudsman, *Protection of whistleblowers*, Practical alternatives to confidentiality, Australia, 2004
[76] See Article 6 of the Law n°. 571 of 14 December 2004 issued by the Parliament and published in the Official Gazette n°. 1.214 of 17 December 2004

Whistleblowers who openly raise misconduct(s), can suffer from different types of retaliation. Although they are, in theory, normally protected from retaliation from their employers by labour laws, persecution of whistleblowers has become a major point of interest in several countries.[77] That is why countries such as the United Kingdom and the United States have introduced a broad range of legal instruments.

Whistleblowers threaten, in general, those with power. Admittedly, it is quite unusual to blow the whistle on a subordinate. It is, therefore, of the utmost importance to foresee appropriate and effective protection. The current European whistleblower's protection system appears quite deceptive: '*Most member states of the Council of Europe have no comprehensive laws for the protection of 'whistleblowers', though many have rules covering different aspects of whistleblowing in their laws governing employment relations, criminal procedure, media, and specific anti-corruption measures*.'[78] Additionally, whistleblowers often suffer from reprisal, sometimes at the hands of the organisation or group which they have accused, sometimes from other people or entities which are taking a stand against them.

That is certainly one of the reasons why the Council of Europe's Parliamentary Assembly (PACE), recently unanimously adopted a whistleblower protection resolution (Resolution 1729 (2010), Protection of 'whistleblowers')[79] and published recommendations regarding its implementation (Recommendation 1916 (2010), Protection of 'whistleblowers')[80]. Recommendations were adopted by the Committee of Ministers in January 2011.

It is important to clearly identify the protection scope, such as the protection to permanent and temporary staff, regardless of how they were hired or appointed, whether they are paid or not and no matter what kind of duty they fulfill. As mentioned earlier, protection of whistleblowers regulation is often only applicable in cases of corruption. The scope should certainly be extended to cover other irregularities.

3.1.6 Data retention and destruction

The European Data protection Directive and the US Sarbanes-Oxley Act (SOX) have divergent views concerning the anonymous disclosure of wrongdoing(s) through hotlines. Two recent decisions by CNIL (Commission Nationale de l'Informatique et des Libertés) in France and the Wuppertal Labour Court in Germany have depicted whistleblowing hotlines as unlawful under certain circumstances. Interpretation issues regarding anonymous disclosures of wrongdoing may trigger companies and organisations to consider existing guidelines before implementing anything.

[77] Information we learned through the confidential interviews we had in the course of this study
[78] Council of Europe, Parliamentary Assembly of the Council of Europe (PACE),*The Protection of 'Whistleblowers'*, Parliamentary Resolution 1729, 2010, §17
[79] Ibid
[80] Council of Europe, Parliamentary Assembly of the Council of Europe (PACE), *The Protection of 'Whistleblowers*, Recommendation 1916, 2010

Belgium, France, Germany and the Netherlands published some guidelines with strict rules concerning the data retention and destruction. These four countries apply locally implemented rules interpreting the Article 6(1)(c) the EU Data Protection Directive (for further details, see comparison table in appendix A.2.2.). For example, the French guidelines advise to destroy collected data related to financial and accounting issues within two months after a decision or ruling has been made on the complaint.

3.1.7 Compensation and reward

Countries that implemented specific whistleblowing legislation have at their disposal separate policies governing the protection of whistleblowers. For countries that did not have specific whistleblowing protection rules, compensation linked to protection against unfair dismissal and retaliation are in principle foreseen in the labour laws of the Member States.

European countries are, however, (until now) clearly not in favour of the implementation of a reward system similar to the one applied in the US foreseen by the False Claims Act and the recent Dodd-Frank whistleblower provisions encouraging individuals to blow the whistle by means of a financial incentive.[81]

Parties in favor of a reward point out that the publicly appraising of whistleblowers prove the use and value of a whistleblowing programme vis-à-vis other employees. The question remains whether the reward should be financial or other. The Security and Exchange Commission (SEC) is not in favour of the rewards foreseen by the False Claim Act and the Dodd-Frank whistleblower provisions. Recent cases have shown that the amount of the reward can be substantial, but one should consider the reasoning behind such rewards.

It is important to note the fact that in many cases whistleblowers are not kept informed about the evolution of their case. This creates frustration and tension. Additionally, one should consider the integrity of a whistleblower. This could be at stake if substantial financial rewards are granted. This risk could be mitigated by obliging whistleblowers to first disclose internally within the own organisation.

In Europe, organisations are not that prone yet to implement reward systems for whistleblowers. However, Transparency International recently published guidelines for the draft of whistleblowing legislation that clearly state that in some cases reward systems may be desirable.[82]

[81] While the FCA rewarding system was linked to the recovery of federal funds, the Dodd-Frank whistleblower provision is now strictly contingent on 'securities law violations' only and rewarding whistleblowers with an amount ranging from 10 to 30 percent of the amounts collected by the SEC in actions where sanctions exceed $1 million.

[82] Osterhaus A - Transparency International (Germany), *Recommended draft principles for whistleblowing legislation*, 2009

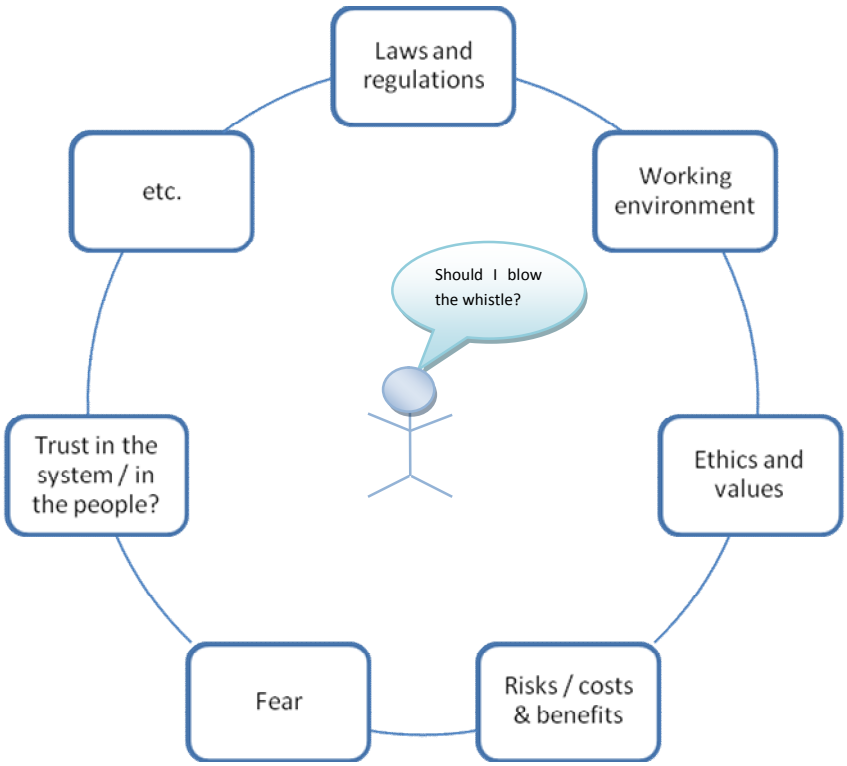
3.2 WHISTLEBLOWER PROTECTION LIMITATIONS

Legal protection of whistleblowers varies from country to country but often faces the same types of limitations, which are linked to:

- Cultural factors;
- Political and legal factors;
- Fear of retaliation and lack of trust;
- Conflict between loyalty to employer, confidentiality and disclosure;
- Conflict with laws.

The diagram below shows the potential elements considered by a potential whistleblower before he or she decides to blow the whistle and disclose wrongdoings.

Figure 17 - Whistleblower protection limitation aspects



Source: PwC Analysis

3.2.1 Cultural factors - negative connotation

Transparency International is a global organisation fighting against corruption. It performs regular surveys and studies on the existence of corruption and ways to fight against corruption. In 2009 it published a study 'Alternative to Silence.'[83] It indicated that ideas about whistleblowers vary widely from culture to culture. US

[83] Osterhaus A. & Fagan C. - Transparency International, *Alternative to Silence - Enhancing Whistleblower Whistleblower Protection in 10 European Countries*, 2009. The 10 countries are: Bulgaria, the Czech Republic, Estonia, Hungary, Ireland, Italy, Latvia, Lithuania, Romania and Slovakia

nationals do not share the European view regarding whistleblowers. In Western Europe, it is akin to denunciation during the Second World War. In Eastern Europe whistleblowing has a negative connotation because of the former dictatorships and police networks. Whistleblowers in these regions are perceived as troublemakers, spies and traitors. This shows that the attitude countries, organisations and institutions have towards the disclosure of information is highly influenced by historical, cultural and political circumstances.

3.2.2 Political and Legal factors - local regulation and lack of political will

A lack of political will to address inadequate whistleblower protection is apparent in many Eastern European countries as explained by the Transparency International study 'Alternative to Silence' from 2009.[84] Political implication and, more precisely, political 'action' is the necessary preliminary step to any legal framework implementation.

Furthermore, as mentioned previously, even if some countries adopt specific whistleblowing regulations, laws often do not cover both private and public sector or there is no enforcement of the existing law.

3.2.3 Fear of retaliation, lack of trust

It seems that the majority of people are not blowing the whistle, not primarily because they are scared to suffer from retaliation or lose their relationships at work but because they think that the disclosure will not be appropriately followed up. Actually, '*according to research carried out in the United States, potential 'whistleblowers' tend to remain silent for two main reasons: the primary reason is that they feel their warnings will not be followed up appropriately, and only the secondary reason is fear of reprisals*.'[85]

Persecution of whistleblowers has become a serious issue in many parts of the world. Although whistleblowers are often protected from employer retaliation under law, there have been many cases where practice has proven otherwise. In some countries, there is a 'shoot the messenger' mentality by corporations and government agencies accused of misconduct (thus both in public and private environment) and in some cases whistleblowers have been subjected to criminal prosecution in reprisal for reported wrongdoing.

This fear for retaliation and persecution has been widely confirmed throughout the interviews and meetings we had in the course of the underlying study. In several instances, our interview subjects confirmed the lack of a transparent, open and constructive culture. Top and line management often are not open for discussion and are unwilling to listen to bona fide whistleblowers who act in the best interest of the EU institutions.

[84] Ibid
[85] Council of Europe, *The protection of 'whistleblowers'*, Explanatory memorandum, by Mr Omtzigt, rapporteur to the Report Committee on Legal Affairs and Human Rights, Parliamentary Assembly of the Council of Europe, Doc. 12006, 14 September 2009, §8 and Thomas M Devine and Donald G Aplin, *Whistleblower protection* – The gap between the law and reality, 1986

3.2.4 Conflict between loyalty to the employer, the confidentiality of the information and disclosure the wrongdoing

It is crucial to differentiate loyalty and confidentiality. The meaning of loyalty often means that you are being loyal to the people inside the organisation, and not always to the organisation as a whole. A major issue is that an organisation is considered as an abstract form and people tend to build relationships with the person they work with or report to.

3.2.5 Conflict with local / national / international laws?

Managers, superiors and leaders need to be trained and encouraged to create strong ethical cultures and integrity within their organisation. In each of the interviews we had for this study the interviewees indicated that top and line management in the EU institutions and agencies is not transparent and constructive. People are afraid to voice their opinion no matter what the topic is. Staff and employees need to be convinced that management does not just 'talk the talk'; the commitments leaders make - especially when they talk about the importance of ethics and support for whistleblowers - need to be implemented and adhered to, and this commitment needs to start at the top.[86]

One major aspect of the application of the protection statutes is the legislation that needs to be respected. In order to trigger protection, the whistleblower must strictly follow the whistleblowing procedures because it needs to correspond to a disclosure and an organisation member foreseen by the rules.

3.3 STATEMENTS AND PRELIMINARY RECOMMENDATIONS BASED ON THE WHISTLEBLOWING EXPERIENCE OF THE EU COUNTRIES

Regarding whistleblowing systems in application in Europe, we can put forward the following statements:

- The current concept of whistleblowing and whistleblowing programmes is 'new' and underdeveloped in most of the countries (in terms of legal regulations and practice). The situation is slowly improving / developing to strengthen protection mechanisms but is particularly focused on public environments;
- The European institutions as well as most of the countries of the European Union do not include a broad description / definition of the whistleblower and/or whistleblowing. PwC will therefore mention in the recommendations that clear and complete rules should be developed and that the protection to current, former, permanent or temporary staff should be encouraged, regardless of how they were hired or appointed, whether they are paid or not and what kind of duty they fulfill;
- Considering the mixture of countries' background, a common effort is required in educating the people. Furthermore the right message needs to be communicated to the public (and private sector) to better understand and then accept and appreciate the notion of whistleblowing;

[86] Ethics Resource Center, 2007 *National Government Ethics Survey - An Inside View of Public Sector Ethics*, Fourth in a longitudinal study of U.S. workplaces, USA, 2008, p.39

- The European institutions should undertake a large-scale campaign to raise awareness in order to promote greater public understanding about the positive contribution of whistleblowers to the protection of public interests (post-communist countries);
- Whistleblowing is often not well perceived due to the existing social, cultural and political context. EU countries should promote a political will and democratic, transparent management. Politics have a major role to play to encourage the reporting of illegal activities. This situation increased the potential weight of a European directive (covering both the private and public sector) which could harmonize and clarify the current situation.

Another aspect to be considered is the gap between the theory of whistleblowing policies and the use in practice of developed mechanisms. In all organisations particular attention should always be paid to an efficient implementation of the rules and the enforcement thereof.

History already showed us that individuals, companies, institutions or politics tend to recognize the scope, consequences and the danger of system weaknesses only when a problem appears. Amendments to existing regulations or directives do not have to be the answer to the next crisis situation. We learned from the European and the American experience that urgent answers brought to counter urgent problems are not efficient enough and will require various adjustments. Having a proactive attitude has to become a priority for any sector in any part of the world.

Taking into account the numerous Transparency International reports and other statistics, it is clear that high levels of corruption and other fraud types still exist worldwide. The World Bank, in 2004[87], estimated the bribes paid in the world in both developed and developing countries to amount to $1 trillion.[88] Besides those direct financial costs, any misconduct has an (in)direct non-financial impact on other factors; for example, employee's moral, the well-being of employees within the organisation, image and reputation. This is why taking measures regarding the issue of whistleblowing is particularly useful and is gaining more and more attention at present throughout the world.

3.4 THE ANGLO-SAXON FRAMEWORK

The evaluation of methods used by the European countries while implementing a whistleblowing policy locally, reveals they could still learn from the UK and the North American comprehensive national whistleblowing laws. Both countries appear to be a model[89] and have implemented specific legislation on the protection of whistleblowers.

Sophisticated regulatory models exist in the United Kingdom since the late nineties and in the United Stated of America since the U.S. civil war in the 1860s. We refrain from copying one system or the other because of cultural differences

[87] The $1 trillion figure, calculated using 2001-02 economic data
[88] Worldbank website, *The Costs of Corruption*, 8 April 2004
[89] The UK law was even described as *the most far-reaching whistleblower law in the world* by the Guardian in 1999

but we can use their experiences and positive and negative points to retrieve the main key criteria that every whistleblowing system should contain.

3.4.1 The UK model

As mentioned in the book of Wim Vandekerckhove[90], the debate in the United Kingdom about whistleblowing started in 1990 with a report called 'Minding Your Own Business' addressing this issue. The issue was raised following some environment and human disasters in the late eighties. This report noted that employees are, most of the time, well aware of irregularities taking place on the work floor. The first specific legislation passed in the UK is the Public Interest Disclosure Act (PIDA) which was enacted in 1998 and came into force in July 1999 amending the Employment Rights Act 1996 from sections 43A to 43L.

The chart below reflects the English legislation regarding whistleblowing and whistleblower protection.

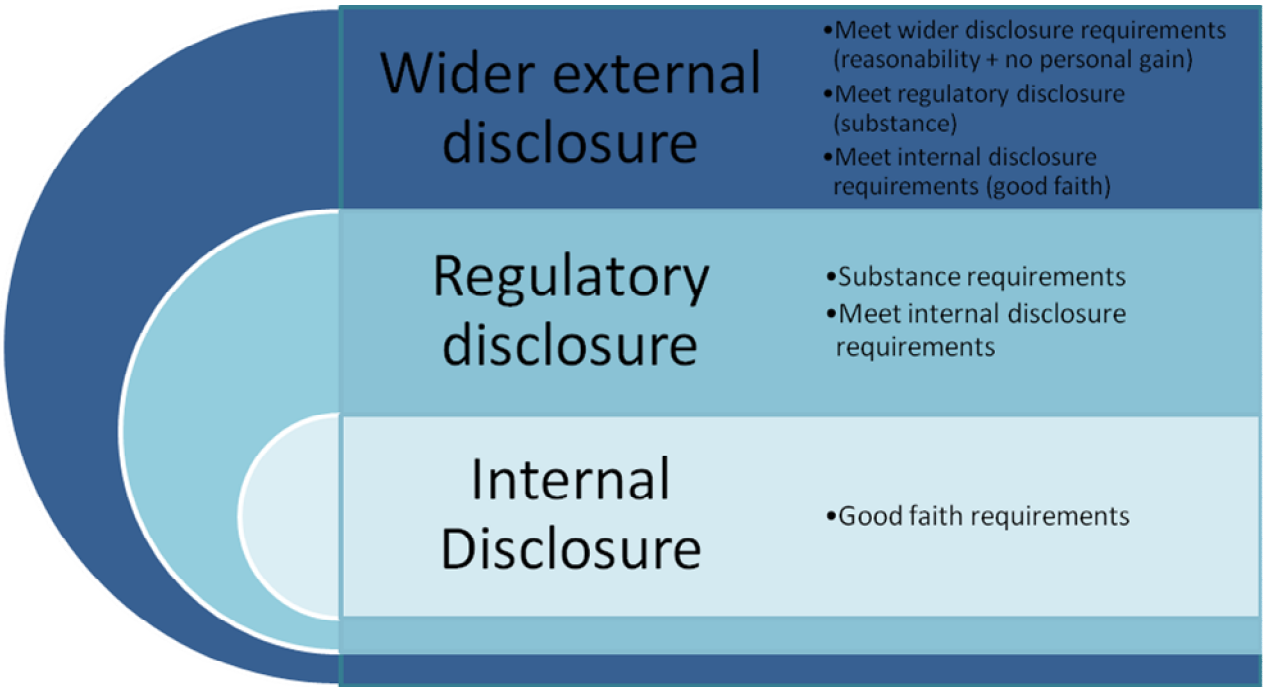
[90] Vandekerckhove W., *Whistleblowing and Organisational Social Responsibility*, Asghate, England and USA, 2006

PIDA provides a framework of legal protection for individuals who disclose information so as to expose malpractice and matters of similar concern by protecting whistleblowers from victimisation and dismissal. Protection from reprisal or sanction is provided if the qualifying disclosure (described under PIDA section 43B) meet the requirements criteria, is made either internally or externally in good faith to:

- An employer or another responsible person (43C);
- A legal adviser (43D);
- The Minister of Crown (43E);
- A prescribed person (regulator) (43F);
- A non-prescribed person in exceptional cases (43G & H).

On top of the good faith requirements necessary to assure the protection of internal disclosures, external disclosures to a prescribed regulator must also meet some substantive requirements. Wider disclosure to non-prescribed regulators are protected if, in addition to the good faith and substance requirements, disclosures *are reasonable in all the circumstances and are not made for personal gain.*[91]

Figure 18 – The UK disclosure protection requirements



Source: PwC Analysis

[91] Public Concern at Work, *Making Whistleblowing Work, Whistleblowing and Data Protection*, Paper presented to Article 29 Working Party Brussels, 31 January 2006

As illustration, section 43 F protects an employee who is blowing the whistle to a prescribed regulator under the following conditions:

(1) A qualifying disclosure is made in accordance with this section if the worker-:

(a) makes the disclosure in good faith to a person prescribed by an order made by the Secretary of State for the purposes of this section, and

(b) reasonably believes:

(i) that the relevant failure falls within any description of matters in respect of which that person is so prescribed, and (ii) that the information disclosed, and any allegation contained in it, are substantially true.

(2) An order prescribing persons for the purposes of this section may specify persons or descriptions of persons, and shall specify the descriptions of matters in respect of which each person, or persons of each description, is or are prescribed.[92]

As explained earlier in this paper, European countries give privilege to internal reporting and impose strict conditions on the possibility to blow the whistle externally.

The tables below show the number of applications made to an Employment Tribunal under the Public Interest Disclosure Act since the Act came into force.[93]

Figure 19 - PIDA applications' number per year

Year	Number of PIDA Applications
1999 / 2000	157
2000 / 2001	416
2001 / 2002	528
2002 / 2003	661
2003 / 2004	756
2004 / 2005	869
2005 / 2006	1034
2006 / 2007	1356
2007 / 2008	1497
2008 / 2009	1761

Source: PCaW

To mark the celebration of the 10-year anniversary of the PIDA, the UK standards icon 'BSI' (the British Standards Institution, also called NSB, National Standards

[92] PIDA 1998, Annotated guide from Public Concern at Work, http://www.pcaw.co.uk/law/pida.htm#43f

[93] Information available on the website of 'Public Concern at Work' (PCaW), an independent charity founded in 1993. Public Concern at Work, *Making whistleblowing work - Latest Figures for PIDA Applications*, http://www.pcaw.co.uk/law/pidalatestfigures.htm

Body) has released a new code of practice helping employers to implement whistleblowing rules within their organisation.[94]

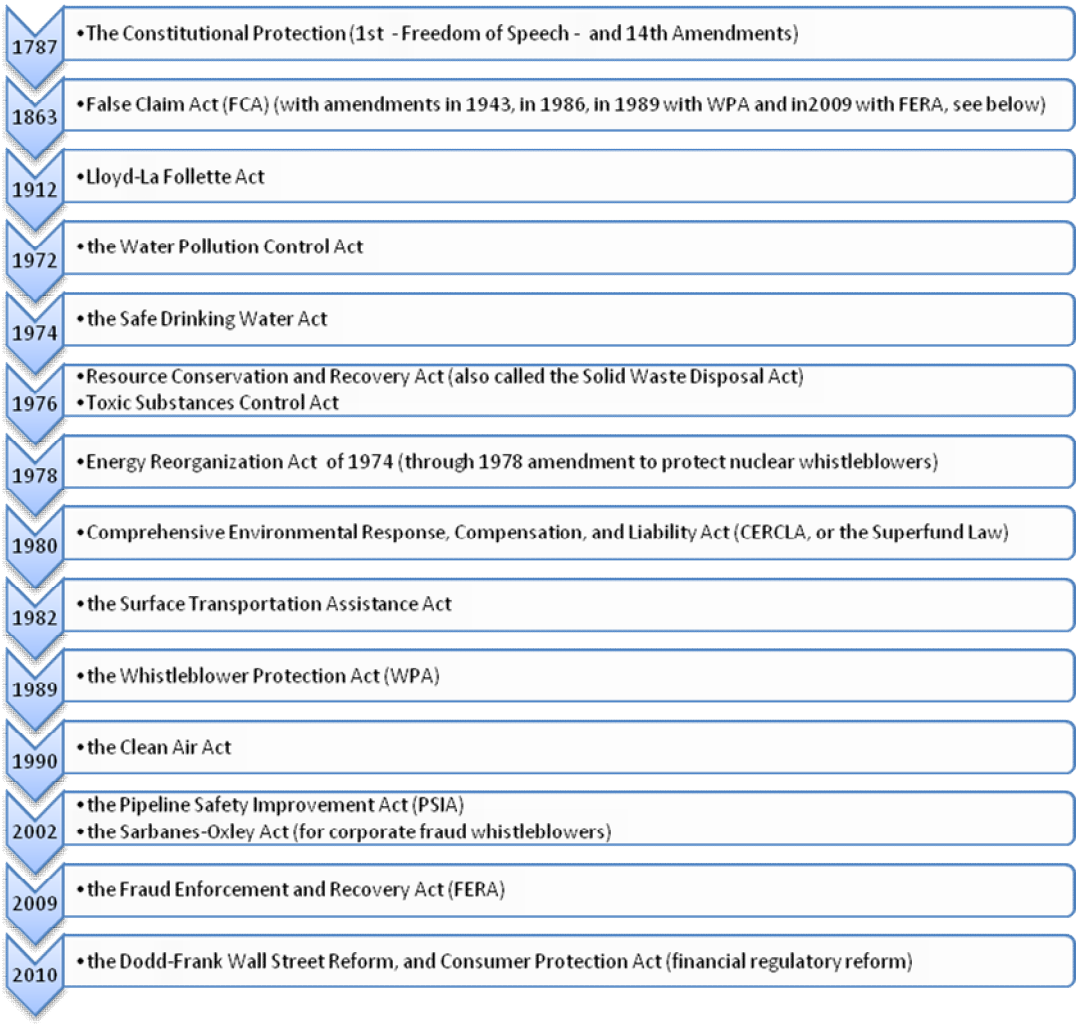
3.4.2 The US model

Even if the United States is a federal state, some whistleblower regulations vary from state to state and from sector to sector and are, therefore, characterized by a combination of regulations at different levels. Certain sectors were the first to be subjected to stricter regulation such as the heath and the security sector.

In this section, we will analyse the federal US whistleblowing system evolution and identify the advantages and disadvantages of the current situation.

The North American model is the result of numerous acts enacted by different politicians throughout time. It was built 'piece by piece' or better 'act by act'. To better understand the long American experience in that field, some relevant federal acts are listed below:

Figure 20 - Main US federal reporting / whistleblowing regulations



Source: PwC Analysis

[94] British Standards Institute (BSI) & Public Concern at Work, *PAS 1998:2008 Whistleblowing arrangements - Code of Practice*, BSI, 2008

When looking at this visual representation of the non-exhaustive US federal regulation, we notice that (besides the amendments of the constitution) the first significant law was enacted in 1863 during the civil war by rewarding citizens who reported unlawful activity in military contracts. The regulation has constantly evolved to respond to specific preoccupations at the time. The current US comprehensive legislation represents a model for many countries not only because of this long legal history but also because they have experienced numerous scandals and problems and they have adjusted their legislation consequently. Even if the US federal regulation is considered as a model, it does not mean that the legislation is perfect. But it can certainly inspire other countries and organisations to help them build their own whistleblowing system as they take into consideration their own political and cultural characteristics.

The False Claims Act (FCA), also called the 'Lincoln Law' and its amendments can illustrate this assertion:

> *In 1986, the government expanded the False Claims Act to provide payouts to people who revealed fraud in other government contracts. Recently, the biggest awards have gone to whistleblowers who revealed fraud in government-funded health care programmes. In 2009, a former Pfizer pharmaceutical salesman was awarded $51.5-million after revealing problems with the drug Bextra, which was prescribed for pain associated with arthritis and menstrual discomfort. The drug was pulled from the market in 2005, and the drug company paid the government a record fine of $2.3 billion.*[95]

In 2009, a major amendment was brought to the FCA. This amendment has an influence on almost every person, company, and/or entity that either pays money to the government or receives Federal funds (such as health care entities).

The US Department of Justice has been able, under the FCA, to recover '$3 billion in civil settlements and judgments in cases involving fraud against the government in the fiscal year ending Sept. 30, 2010.'[96]

If we continue using our FCA example, we can measure the effects of the law, here the revised FCA of 1986, by using the following statistical information (from the non-governmental organisation 'Taxpayers Against Fraud' (TAF).[97]

The graph below represents the amount (in US dollar) recovered by law suits initiated by the government (blue) and by a whistleblower (brown). The trend clearly indicates that the amount recovered by whistleblowers is nearly $10 billion.

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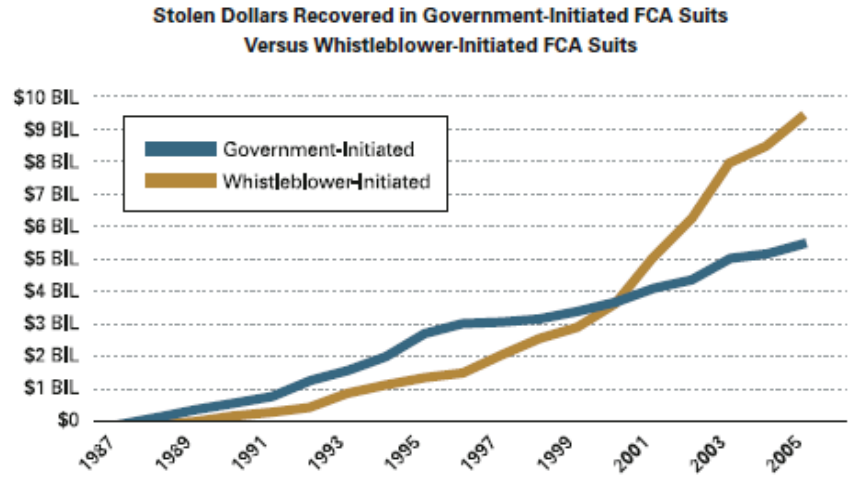
[95] http://www.fairwarning.org/2010/07/financial-reform-law-could-reward-private-sector-whistleblowers-in-a-big-way/

[96] The US Department of Justice, *Department of Justice Recovers $3 Billion in False Claims Cases in Fiscal Year 2010*, Justice News, Washington, November 22, 2010 http://www.justice.gov/opa/pr/2010/November/10-civ-1335.html

[97] TAF (Taxpayers Against Fraud), *The 1986 False Claims Act Amendments, A Retrospective Look At Twenty Years of Effective Fraud Fighting In America*, http://www.taf.org/retrospective.pdf

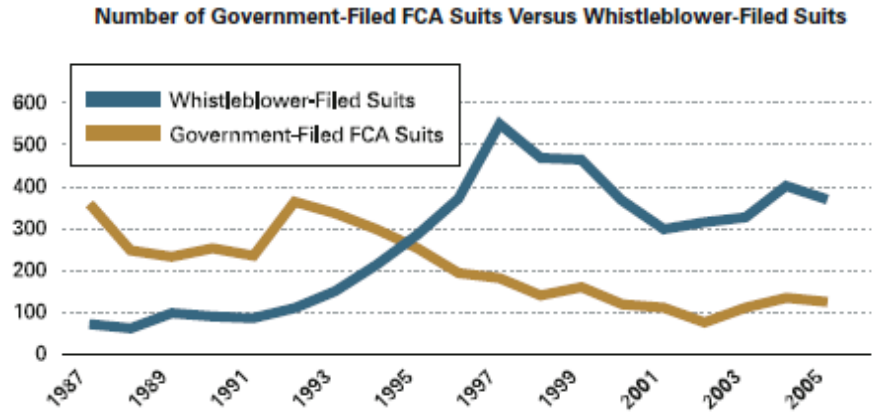
Figure 21 – Impact of the 1986 FCA Amendments on initiated suits' sources



Source: TAF http://www.taf.org/retrospective.pdf

The following graph depicts that there 'has been a significant shift from government-filed suits to whistleblower-filed suits. Only 15% of all new FCA actions filed in 1987 were whistleblower suits[98]' but the trend seems to be reversed in 2005.

Figure 22 - Impact of the 1986 FCA Amendments on filed suits' sources

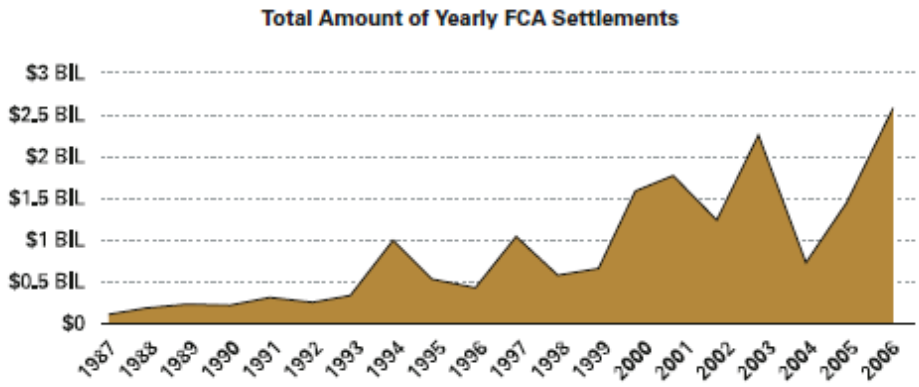


Source: TAF http://www.taf.org/retrospective.pdf

The next chart refers to the efficiency of whistleblowers in the overall fraud enforcement system. 'In 1987, 73 FCA settlements returned only $87 million to the American treasury or less than $1.2 million per settlement[99] while $3 billion in civil settlements and judgments have been recovered as of the 30th of September 2010 (with $2.5 billion, or approximately 83%, of the recoveries that were related to health care fraud cases).'

Figure 23 - Impact of the 1986 FCA Amendments on the Amount of Yearly Settlements

[98] Ibid
[99] Ibid



Source: TAF http://www.taf.org/retrospective.pdf

As explained by Miceli, Near and Dworkin in their 2008 book, the North American model enacted 2 types of whistleblowing legislation: '*laws that focus on protection against retaliation, and laws aimed at encouraging whistle-blowing through incentives*.' [100]

3.5 MAIN SIMILARITIES AND DIFFERENCES BETWEEN THE TWO MODELS

Figure 24 - Similarities and Differences between the UK and the US Models

	US	UK
Similarities	+ Regulation was triggered by catastrophes (human disasters for UK and financial scandals for the US); + No protection in case of bad-faith whistleblowing; + Public sector employees receive the same protection than private sector employees (but in the US, the Whistleblower Protection Act (1989) only covers federal workers); + The importance to respect the confidentiality concept + No normative terms used regarding the severity of the wrongdoing.	
Differences	- Whistleblowing to the media is not protected; - SOX requires to implement a formal whistleblowing procedure; - Reward / incentive system encourages individuals to blow the whistle.	- UK protects reporting to the Media only when strict perquisites are met under limited circumstances; - PIDA does not require companies to implement a formal whistleblowing procedure; - UK encourages internal reporting in most circumstances; - UK denies protection to whistleblowers who received any

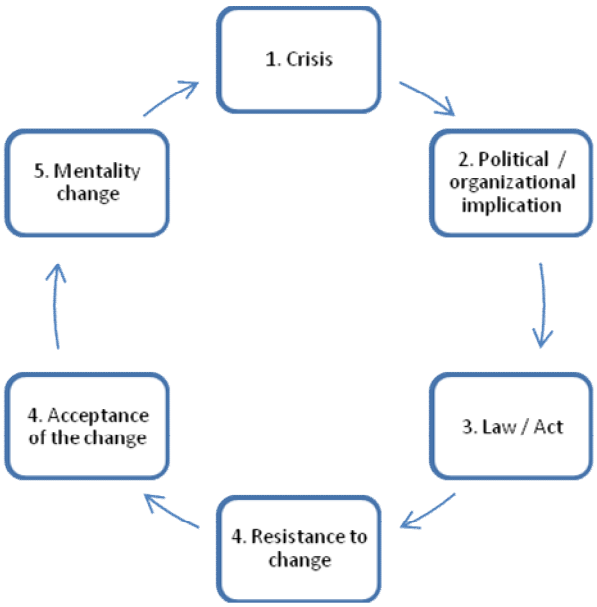
[100] Marcia P. Miceli, Janet P. Near, Terry Morehead Dworkin, *Whistle-blowing in Organisations*, , Routledge, Taylor & Francis Group, New York, 2008, p.154

		incentive to blow the whistle.

Source: PwC Analysis

Sophisticated regulatory models exist in the United Kingdom since the late nineties and in the United Stated of America since the civil war. The exploration of their regulation's long history brings us to the following basic scheme:

Figure 25 - Trigger and Resistance to Change



Source: PwC Analysis

The possibility to fight fraud and mismanagement is the result of the adequate mixture of laws, individual trust in the organisation and in the legal system, personal values, and the perception of the effective application of the law. Giving the right message (through regulation and its effective application) to the people of any organisation or country will help entities to build a trustworthy evolving whistleblowing system.

3.6 WHY EUROPE'S POINT OF VIEW AND CURRENT REGULATION DIFFER FROM THE US?

Contrary to the United States, which is a federal state, the member countries of the European Union embody independent sovereign nations.

Both continents have experienced diverse social, historical and political events: the 1st and the 2nd World War, Communism, etc. These events have created, in Europe, a cultural discomfort about the whistleblowing concept. The Nazi Regime, the mass denunciations during the Hitler regime and the previous dictatorships in Eastern European countries generated a negative connotation associated to the whistleblower's image or the whistleblowing concept.

In addition, mentalities and regulation are different and some corporate wrongdoings could qualify as illegal in the US but not in Europe and vice versa. Examples of cultural differences could be the fact that data protection and privacy matters are treated differently in the US than in Europe.

Another reason is that contrary to the US, various official, formal and organised reporting channels exist for employees in Europe (e.g. through works councils, worker representatives, etc.).

Finally, Europe does not foresee nor does it apply any type of reward system.

The Opinion of the Article 29 Data Protection Working Party communicated that 'the number of issues raised by the implementation of whistleblowing schemes in Europe in 2005, including data protection issues, has shown that the development of this practice in all EU countries can face substantial difficulties. These difficulties are largely owed to cultural differences, which themselves stem from social and/or historical reasons that can neither be denied nor ignored.' [101]

3.7 COMPARISON WITH PUBLIC AND PRIVATE INSTITUTIONS

The main theoretical differences between the private and public sector approach on whistleblower protection are listed in the table below:

Figure 26 - Public and private sector's main characteristics regarding whistleblowing

Public sector	Private sector
• A specific whistleblower protection of public sector employees is mostly foreseen in the national law; • Duty to disclose; • Focus on the organizational structure; • Link to the public or the society in general.	• Specific whistleblower protection of employees from the private sector is often not covered under national law; • Right to disclose; • Focus on the effectiveness of the codes of conduct with protection provisions; • Focus on the risks related to the industry; • Link to the company.

Source: PwC Analysis

Practical experience is countering the idea that the private sector is more efficient than the public one. The Enron case demonstrated that even a company that

[101] ARTICLE 29 Data Protection Working Party, *Opinion 1/2006 on the application of EU data protection rules to internal whistleblowing schemes in the fields of accounting, internal accounting controls, auditing matters, fight against bribery, banking and financial crime*, Adopted on 1 February 2006 (Art. 29 WP117, p.4)

should have been committed in theory to high ethical standards is not above fraud. Enron's company culture demonstrated inappropriate and inefficient whistleblowing policies which contributed to provoke a financial scandal that led to the bankruptcy of the Enron Corporation.

Limitations exist in both sectors. Codes of conduct and staff regulations cultivating high ethical standards are extremely important as is their effective implementation. Furthermore, they are complementary to national and internal regulation and enforcement.

3.8 BENCHMARK SET BY PRACTICE

In the context of whistleblower protection optimisation as a tool to curb corruption, it seems important to consider the orientation of the (inter)nationally recognised 'best practice'. This section will focus on the relevant code of practice of the British Standards Institution (BSI)[102] and on Transparency International (TI).

Both institutions set out the framework of a comprehensive approach promoting the encouragement and efficient management of whistleblowing. This section is the starting point for guidelines towards whistleblowing procedures improvement.

3.8.1 British Standards Institution (BSI)

BSI is the independent UK body responsible for preparing British Standards. It represents the UK view on standards in Europe and at the international level. Together with the UK organisation Public Concern at Work (PCaW) it developed a code of practice on whistleblowing based on 10 years of experience with the UK whistleblowing rules.

The framework has a particular focus on the implementation of whistleblowing procedures which is why we thoroughly analysed this and considered it as a good basis for developing a benchmark model for this study. Moreover, the long tradition and experience of the UK whistleblowing legislation can be considered a solid basis valid for the benchmark exercise in the framework of this study.

3.8.2 Transparency International (TI)

Transparency International is a global organisation for improving the fight against corruption. It is well-known for the corruption index it publishes every 2 years. It has developed principles[103] for whistleblowing legislation with the support of experts and practitioners around the world.[104]

[102] British Standards Institute (BSI) & Public Concern at Work, *PAS 1998:2008 Whistleblowing arrangements - Code of Practice*, BSI, 20

[103] These principles have been developed in a context of the European Commission co-founded project 'Blowing the whistle harder – Enhancing Whistleblower Protection in the European Union, Source: European Commission - Directorate-General Justice, Freedom and Security, Prevention of and Fight Against Crime 2009, Provided by the TI Secretariat, *Blowing the Whistle Harder – Enhancing Whistleblower Protection in the European Union*, Project brief, Terms of Reference of National Whistleblower Protection Assessment

[104] See appendix A.7

Referring to these principles is important for two reasons:

(1) The focus of these principles is the fight against corruption;

(2) The emphasis is put on the protection of a whistleblower.

3.8.3 Tailored benchmark

The combination of the best practices of BSI and the principles of TI result in a benchmark model that serves the goals of this study well; therefore we based ourselves upon these two best practices to create this benchmarking table (see figure 27).

3.8.3.1 Scoring to benchmark

In order to compare and evaluate the rules and practices for whistleblowing within the EU institutions to the chosen benchmark, we organised an internal discussion with the whole project team. The evaluation was done based upon the results of both theoretical information and all the confidential interviews we performed throughout the study. For this purpose we used a 5 point scoring model (1= very weak, 5= very strong).

The table below provides the results of the benchmarking exercise.

Figure 27 – Benchmarking table

Issue	Score	Explanation
The Policy in the organisation		
1. The organisation's policy conforms to good practice and:		
a) gives examples of the types of concerns to be raised, so distinguishing whistleblowing from grievances;	**2**	Neither examples nor clear definitions are given. Only general terms, which makes it difficult for staff to judge and to make the difference between a whistleblowing issue and grievances.
b) gives the option to raise concerns outside of line management;	**3**	Only possible if strict conditions are fulfilled and the options given are perceived as not approachable. Moreover there exists a formal interdiction to go public.
c) provides access to an independent helpline offering confidential advice;	**1**	OLAF is an investigative body and therefore in the first place interested in having the information and not in offering confidential advice or support. Above all, OLAF is not (perceived as) an independent body.

d) offers option to raise concerns in confidence;	**2**	There is no guarantee for confidentiality when disclosure is made to superiors and there is no monitoring role for ethical correspondents. The raising of a concern in confidence is not explicitly foreseen in the Staff Regulations. When complaint is made to European Ombudsman, the name of the whistle blower needs to be disclosed. The new Fraud Notification System of OLAF (NFS) is however an good alternative to disclose in confidence
e) explain when concerns may safely be raised outside (e.g. with a regulator)	**1**	Not possible to disclose a concern outside the EU institutions
f) prohibits [i] reprisals against a bona fide whistleblower, and [ii] the making of a false allegation maliciously.	**3**	Not clear for staff because nor a bona fide, nor a malicious whistle blower is defined. A sanction provision does not exist in the Staff Regulations.
Buy-in		
2. Those in charge have been briefed on the role of management and openness, confidentiality, anonymity and trust	**2**	An effort has been done to make the whistleblowing provisions known and to explain certain key elements, but besides the line management it exists no designated officers with a monitoring role.
The right start		
3. Practicalities, feedback, safeguards and misuse are consulted on	**2**	Besides a limited survey done by OLAF, these aspects have never been properly evaluated within the EU institutions.
4. The role of subcontractors is considered	**1**	Not foreseen in the whistleblowing provisions, except for the EIB.
5. Line managers brief employees on the arrangements when rolled out and updated	**2**	No updates are made since 2004. Only one example found of yearly briefing of Staff (Eurostat)
Internal support and protection		
6. Protection of identity (Confidentiality/Anonymity)	**2**	There is no obligation to protect the identity, except in EIB policy, and there

		is no sanction for not protecting the identity. Although FNS is a strong protective tool, anonymity cannot be guaranteed after OLAF has done the investigation (taking the case to court or to the European Ombudsman.)
7. Protection against retribution (Protection of Employment Status / Compensation / Sanctions)	**2**	Very limited, the actual wording '*prejudicial effects*' is very vague. Better wording however in EIB policy.
8. Reversed burden of proof (up to employer to establish that any measures taken to the detriment of a whistleblower were motivated by reasons other than the latter's disclosure)	**1**	Not existing protection measure in the actual rules.
9. Waiver of liability (any disclosure made within the scope of the rules shall enjoy immunity from disciplinary and liability under criminal, civil and administrative laws)	**1**	Not foreseen in the actual rules
10. No sanctions for misguided reporting	**3**	The rules refers to honest error in Art 22 b 1 (a), but rather as a condition to disclose outside the line management.
11. Right to refuse (allow the whistleblower to decline participation in suspected wrongdoing without any sanction or disadvantage as a result)	**1**	Art 21a of the Staff Regulations foresees a certain right of refuse, but is not covered by any protection and not included in art 22a and 22b
Communication and confidence		
12. The organisation undertakes activity to promote staff awareness of the arrangements (Awareness & Regular communication)	**3**	Efforts are done to raise awareness, but no confirmation on a regular basis (update and refresh…)
13. Employee confidence, knowledge and experience of the arrangements are	**2**	Although we wanted to organise such an assessment on a large scale via a web based survey, we were not allowed to do

assessed		so. We have found no evidence during our study of such an assessment, beside a case by case assessment in the clearing house.
Briefing/Training		
14. Line and senior managers are briefed on their roles under the policy	**1**	A specific briefing or training for line management has not been developed and implemented. This shortcoming is also due to the fact that their role and responsibility has not yet been clearly defined in the actual whistleblowing system.
15. Designated officers with a role in handling concerns are briefed and trained	**2**	Ethical corresponds are not really trained and briefed in relation to the whistleblowing provisions and their potential role in it.
Logging concerns		
16. Concerns raised formally through the whistleblowing arrangements are recorded and logged centrally	**1**	No central logging and registration system exists. Only OLAF keeps some statistics, but from 2009 on, they only relate to the broader notion of informants. Statistics of European Ombudsman only related to complaints (probably only a small portion of the total population of whistleblowers within the EU institutions)
Reviewing the arrangements		
17. The effectiveness of the arrangements is reviewed by those charged with governance e.g. the Audit Committee	**1**	Although a recent audit (2009) was performed by IAS on ethics in the European Commission and the agencies, no focus was made on the effectiveness of the whistleblowing arrangements.

Note: the element 'no circumvention' of the issue internal support and protection was not evaluated, because we considered this element to be too vague and therefore not applicable.

Source: PwC Analysis

3.8.3.2 The policy in the organisation

Although no elaborated, explicit whistleblowing policy exists for the whole of the EU, one can argue that an implicit policy exists based upon the whistleblowing provisions in the Staff Regulations (articles 22a and 22b) and the communication effort that has been made to make these provisions known. (For instance: intranet pages within the different EU institutions and the recent initiative of ethical trainings).

Based on the interviews and the analysis of cases and reports we identified two key elements of an effective whistleblowing system, which are that staff:

- Should have the possibility to get support and advice when they want to make a disclosure;
- Should be able to by-pass the line management whenever they feel this is the best way to disclose their concerns and to take the necessary action.

On these key elements only a score of 1/5 is given, which is far from acceptable. And with an average score of 2/5 this issue is clearly below minimum standards and needs to be improved.

Although art 22b – making a disclosure to another institution - is considered to be an external reporting, it is not really external as information still stays within the institutions on the level of their presidents. Based upon our interviews with whistleblowers we doubt the effectiveness of this provision given the limited powers of one institution to really investigate issues going on in another institution. The only outcome is that the disclosed information should be transferred to OLAF and there is no guarantee the identity of the whistleblower will be kept confidential.

3.8.3.3 Buy-in

Although whistleblowing can involve staff going above the immediate superior, the mistake of assuming that this should always be the case should not be made because it is simply undesirable and impractical. A whistleblowing system can and should not be developed as a substitute for line management; it needs to be seen and promoted as a safety net. Therefore the EU institutions – especially those operating in a vulnerable environment from an integrity point of view – should ensure that not only top but also line management supports the whistleblowing idea with a tiered disclosure structure (from open whistleblowing, over raising a concern confidentially to anonymous informing). Without their involvement it would be an expensive and almost impossible task to keep the whistleblowing arrangements alive among staff.

Based upon our interviews, both with representatives of the EU institutions and whistleblowers within the EU institutions we believe that great effort continues to be needed on this issue.

3.8.3.4 The right start

Whistleblowing arrangements are more effective if every EU-institution and body, similarly to EIB, makes it clear to staff that the institution wants to create a safe environment to disclose wrongdoing because it is in the interest of the integrity and the reputation of the EU-institution and the EU citizens. However this will not be achieved if the whistleblowing provisions give the impression of being part of a legalistic tick-box response. Therefore it is of utmost importance for the effectiveness of a whistleblowing system that staff, management and unions are consulted on a regular basis on the practicalities, the feedback and follow-up of disclosures, the functioning of safeguards and, last but not least, the misuses. It

is well-known that misuses are a legitimate concern to top management; however they may not be an inhibitory factor either.

We want to draw attention to one particular, critical success factor, namely: feedback and follow-up. It is good practice that a whistleblowing policy incorporates a clear feedback provision on the outcome of the disclosure. This will help reassure staff that the whistleblowing system works. If a member of staff receives, within a reasonable period of time, no feedback, he or she may assume nothing has been done, gets frustrated and eventually will decide to go public. In the actual Staff Regulations an overwhelming focus is made on the obligation to disclose, but very little is said upon feedback and follow-up. (Only in article 22b (1) (b) we find the beginning of such a provision:...the official shall be duly informed of that period of time within 60 days...)

Another important element is the scope of the workforce the whistleblowing rules covers. The wider the scope, the better. As at least some EU institutions contract out significant parts of their activity, it should be considered how best to approach the work of subcontractors. The EIB sets the example here, because their policy applies to 'any other person providing the Bank with services, including consultants and other service providers under contract to the Bank'.

Taking into account an average score of 1,6/5, it is obvious that this issue also needs further development.

3.8.3.5 Internal support and protection

The protection provisions are considered to be the Achilles heel of a whistleblowing system. Therefore these provisions simply need to be strong and convincing for a potential whistleblower. The most important protection in our view however is not the protection against retaliation but the guarantee that the identity of the whistleblower will be treated in confidence. Whistleblowing is not about the messenger, but all about the message.

Based upon our interviews with whistleblowers and our evaluation of the rules an average score of 1,6/5 is a clear indication that the EU institutions, except to a certain extent for the EIB, still have an important effort to make. Protection rules are not included in the Staff Regulations and all whistleblowers we talked to indicated that they had not received protection.

3.8.3.6 Communication and confidence

No matter how good whistleblowing provisions look on paper, they are of little value if staff do not know and/or understand them properly. This implies all EU institutions should ensure there is good awareness among staff. We have established through our study that good efforts have been made to raise awareness among staff in particular within the European Commission (placing FAQs on the intranet, organising ethics training,…). However, to keep this awareness alive, every EU-institution should remind staff at least every other year. We note that a sufficient long time frame is needed in order to be able to perform a careful evaluation.

Communication and awareness are two things on which EU institutions – at least those services with a higher risk profile – should seek feedback or other information regarding the effectiveness of their implemented whistleblowing arrangements, both from executive staff and line / senior management. The latter is important because these levels will normally receive and deal with whistleblowing concerns, some of which will not formally be raised under the whistleblowing rules.

Based upon our evaluation in the benchmarking table (see figure 22) on this issue, efforts continue to be needed in the future to assess, among staff, the subjects of confidence, knowledge of and experience with whistleblowing policies.

3.8.3.7 Briefing/training

Because whistleblowing concerns should be raised openly with line managers as part of normal day-to-day practice, managers should be properly briefed on how to handle a case when one of his or her staff people formally cites the whistleblowing rules when raising a concern.

We have been informed during our study of the existence of an ethical correspondent network within the European Commission. This network was created to assist staff when they are confronted with ethical questions or dilemmas. Based upon a mini survey we conducted among these ethical correspondents, it has become clear this network is not given a specific role in whistleblowing arrangements. (See appendix A.4. for the results of the 'mini-survey') The ethical correspondents are not trained in the operation of the whistleblowing rules and in how to handle possible disclosures.

3.8.3.8 Logging concerns

An integrated reporting system for recording and tracking staff reports of wrongdoing is an essential part of a good whistleblowing system in order to effectively monitor:

- How many disclosures and for what types of wrongdoing are being made in the different disclosure channels;
- What investigation or other action is being taken;
- What the outcome is of the conducted investigation or other action;
- What the lessons learned are.

Of course care should be taken not to impose a disproportionate scheme for recording all (potential) whistleblowing concerns.

Our evaluation clearly indicates that the EU institutions as a whole currently lack sufficiently comprehensive systems for recording and tracking staff disclosures of wrongdoing.

3.8.3.9 Reviewing the arrangements

In order to evaluate the progress and effectiveness within the different EU institutions and highlight any issues that require attention a periodic review should be made, especially for those institutions with a higher risk profile.

4 CONCLUSION AND RECOMMENDATIONS

4.1 CONCLUSION[105]

Based upon the work performed and described above, the main conclusion of our study is that the current whistleblowing rules within the EU institutions are not (yet) an effective instrument for fighting corruption and conflict of interest in EU institutions.

The arguments to support this conclusion can be divided into two categories. The first category relates to the provisions itself and the second refers to the implementation of these rules.

4.1.1 Whistleblowing rules

Except from the more developed and integrated whistleblowing policy within the EIB, the actual rules (art 22a and 22b of the EC Staff Regulations) are not clear for potential whistleblowers, do not encourage whistleblowing, are too narrow and incomplete. Several questions still remain, for instance:

- When can a disclosure be considered as qualified in order to get protection?
- When is somebody considered to be a malicious whistleblower or a whistleblower in good faith?
- Will a malicious whistleblower be sanctioned?
- What are the duties of the receivers in art 22b and what kind of follow-up should they give?
- How will confidentiality be guaranteed?
- When and how will a whistleblower get feedback?
- What about subcontractors? To which extent do they need to be within the scope of the whistleblowing provisions?

Moreover, the current EU rules cannot be considered real whistleblowing provisions because they only focus on the procedure of a disclosure of possible illegal activity or misconduct. Moreover, they mainly foresee obligations for the whistleblower and practically no obligations for the institutions. As described in more detail in the benchmarking, they lack almost complete attention for the most important objective of any whistleblowing framework: adequate support and reliable protection of the whistleblower. From the compared whistleblowing procedures in the six European countries, we believe the citizenship model from

[105] Preliminary comment: Given the sensible nature of the topic, we first want to underline the fact that within the limited timeframe of this study we received a great deal of cooperation from the EU institutions. Thanks to the support of the Committee on Budgetary Control of the European Parliament, we were able to talk to several whistleblowers in confidence, which was a unique experience. We regret, however, that we have not been able to conduct a web-based survey among a wide representation of staff and officials in order to gain their views and experiences of whistleblowing within their institutions.

the UK matches best the needs of the EU institutions, because of its tiered disclosure framework and well-developed protection provisions.

4.1.2 Implementation

Having rules is one thing but implementing them is something completely different. Although the EU institutions have undertaken several initiatives to make whistleblowing rules known to staff, to install some coordination mechanisms and to create at least one confidential reporting channel (FNS by OLAF), these actions are not enough to operationalise an effective approach.

The four main implementation deficiencies, according to our findings, are:

1. No integrated organisational approach exists due to the following issues that are assessed as weak in the benchmarking with good practices:

- No emphasis on the integrity and reputation of the EU institutions as a whole (no clear link with the codes of conduct);
- No internal assessments of confidence in, knowledge about or experience with the whistleblowing rules;
- Line management not properly briefed and trained on how to handle cases;
- Ethical correspondent network only in European Commission (not in other EU institutions) and with a too limited scope (only for ethical questions. No monitoring role in relation to whistleblowing);
- Little effort to keep the arrangements alive among management and staff;
- No incentive to report wrongdoing and no sanction when no (timely) reporting occurs.

2. No independent helpdesk exists offering confidential advice and support to (potential) whistleblowers;
3. The assessment and investigation function is combined in one single EU body (OLAF), which is not (perceived as being) independent;
4. No valid tracking and tracing system for disclosures exists, and, as a consequence, there is no solid management reporting or staff reports.

In order to improve the effectiveness of the EU whistleblowing system we are convinced that the EU institutions as a whole need first to rethink their whistleblowing architecture as part of a desired ethical change – what is required in practical and qualitative terms on short, middle and long term to evolve to a new generation whistleblowing programme - before changing the whistleblowing rules and procedures. Just changing the rules and procedures will not make whistleblowing within the EU institutions more effective. Rules must also be known, accepted and respected and all parties involved must live them in practice. Our recommendations in the next chapter are established based on this perspective.

4.2 RECOMMENDATIONS

In order to achieve the overall objective of an effective whistleblowing programme in the next generation for all EU institutions, the adapted whistleblowing framework needs to have the right 'checks and balances': avoiding misuse on the one hand and being perceived by the potential bona fide whistleblower as credible. Therefore, this overall objective needs to be operationalised by three sub-objectives, namely:

- Encourage persons 'related to EU institutions' to report wrongdoing to those that can undertake action;
- Ensure adequate support, effective assessment, timely investigation and appropriate action and follow-up to those reports;
- Organise strong protection for bona fide whistleblowers whilst discouraging malicious whistleblowers.

We have developed our recommendations in the context of these sub-objectives and have indicated for each recommendation the ideal time horizon: short-term (within one year), medium-term (within 3 years) and long term (within 5 years). In order to provide the EU institutions with an outline of a transition plan in order to implement these recommendations in a scheduled project manner and within a reasonable time frame, we also have put together a critical path.

4.2.1 Incitement of a reporting culture

As already pointed out in the 2006 study, the EU institutions should adopt a culture of 'when in doubt, report'. This means that no artificial administrative thresholds for submitting and receiving reports should be set. It is in the interest of the integrity and the reputation of the EU institutions to receive too much information about wrongdoing than too little or too late.

4.2.1.1 Recommendation 1: adopt an integrated ethical compliance framework

Time horizon: medium-term

Whistleblowing cannot be implemented as a separate instrument to fight corruption and conflict of interest. It needs to be embedded in the EU Institutions in a holistic fashion and be part of an integrity policy. Therefore, we recommend taking the current EIB policy as a starting point to build an integrated ethical compliance framework for the EU Institutions as a whole.

The following elements are intended to help ensure that the many complex issues involved in the realization of this recommendation are addressed properly:

Define only the legal fundamentals in the new Staff Regulations and make a clear reference to the code of conduct and subsequently a more detailed whistleblowing policy. These legal fundamentals are:

- Definition of a qualified disclosure;
- Definition of a malicious whistleblower;
- Definition of a whistleblower in good faith;

- Delimitation of the powers of the key actors;
- Protection provisions related to a qualified disclosure.

Elaborate a whistleblowing policy in a transparent and constructive manner in clear wording and foresee at least the following elements:

- Identification of the scope:
  - All staff;
  - Consultants and service providers (optional).
- Multiple reporting pathways

Different issues need different reporting channels and different handling:

- Fraud and corruption;
- Apparent breaches of law and violations of codes of conduct;
- Dignity at work (harassment and bullying).

Clear understanding of roles and responsibilities of key persons

- Top management and line management;
- Designated internal officers with a role in handling concerns especially for issues related to fraud and corruption or code of conduct violations[106] (see also recommendation 5);
- Independent external body for advice, disclosure, assessment, referral and follow-up (see also recommendation 6);
- Investigative bodies and/or bodies that need to take appropriate action.

Reporting procedure

We want to underline that based upon our interviews both with whistleblowers and the representatives of the EU Institutions we recognized the incompatibility of the same individuals trying to investigate disclosures and seeking to provide the concerned whistleblowers with support. Although the investigators of OLAF may be sympathetic and a source of advice to whistleblowers, their primary role is to properly investigate an allegation rather than provide (ongoing) support.

Concerning the potential enlargement of the scope to subcontractors, we advise to use a risk assessment approach based upon risk factors such as: type of activity, the (financial) interests at stake, potential litigations, etc.

As far as the multiple reporting pathways are concerned, we recommend the following tiered structure, instead of the actual structure foreseen in art 22a and 22b:

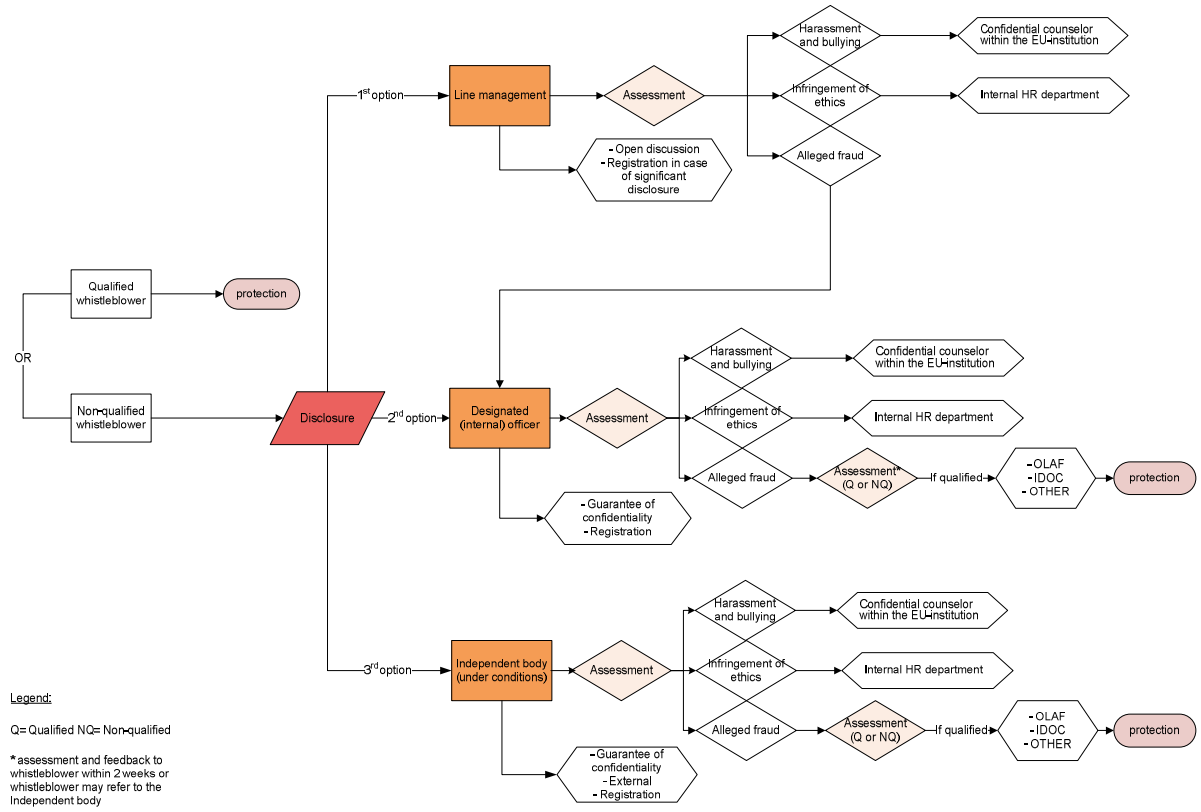
- A first and open (no guarantees for confidentiality) pathway, which needs to be seen as the natural first channel to raise a concern: the line management;

[106] Within the Commission there exists already a network of confidential counselors for issues of dignity at work and an anti-harassment policy (Decision 1624/3 on harassment of April 2006)

- A second and confidential pathway within each EU-institution, offering a second safe option for the potential whistleblower to make a disclosure without restrictive conditions: designated officers with a special statute that guarantees confidentiality (see also recommendation 5);
- A third and confidential pathway, positioned as a last resort to go to and therefore the access to this pathway can be limited by certain conditions: an independent body outside the EU institutions (see also recommendation 6).

Besides these three pathways, a potential whistleblower can always make a disclosure directly to OLAF.

In order to have a better idea how this structure might work we refer to the flow chart[107] below:



Source: PwC Analysis

4.2.1.2 Recommendation 2: demonstrate that the whistleblowing system works

Time horizon: medium term

While carrying out our study, we realized that we only came across negative whistleblowing stories which show how dangerous and destructive whistleblowing can be for the whistleblower. So we didn't find a real example case showing that whistleblowing is able to provide change. Therefore we strongly recommend that:

- The benefits of a confidential online reporting tool are promoted throughout all EU institutions;

[107] For a larger format, see appendix A.16.

- 'Model cases', when available, are used as a convincing training instrument for key persons;
- Successful measures taken in concrete cases (like measures against retaliation or sanctioning of malicious whistleblowers) are communicated in an anonymous way to staff;
- An informal rewarding approach for whistleblowers in good faith should be adopted.

By an informal rewarding approach we mean that line and senior management recognizes blowing the whistle on a structural illegal activity that can save the EU a substantial amount of money is (morally) brave and can be taken into account during the evaluation of the concerned staff member. Rather than work out this possibility in any procedure, the issue should be left to the discretion of the competent authority.

4.2.1.3 Recommendation 3: develop a coordinated system for tracking all significant reports of wrongdoing for the different reporting channels

Time horizon: medium term

As pointed out in the benchmarking chapter a well-designed registration system is a cornerstone for every good whistleblowing system. More important than the number of disclosures made is their significance and whether investigation showed them to be well-founded, partially substantiated, or unsubstantiated. One single solid disclosure over a period of several years can more than justify the expense of a whistleblowing programme as part of an integrity policy.

The registration system needs to be coordinated - because several reporting channels will be involved – but at the same time it may not be a disproportionate scheme. It should be sufficient for line management to record and pass on a summary of the concern when a staff member (or an in-house consultant) formally invokes the whistleblowing policy or when the reported concern is judged to be of such significance that it is sensible to keep a central record. Those who receive a disclosure outside the line management (internal designated officers or external body) should always keep records and these should also be logged centrally.

The main benefits for top management of the EU institutions are:

- Providing a confidential tool for the designated officers;
- Getting a good picture of the extent and nature of disclosed (suspected) malpractice and its settlement;
- Using the data to evaluate and develop further its own integrity policy.

A distinction should be made, however, between the disclosure reporting (treatment and processing of information after disclosure) and management reporting (periodic report with policy information).

The EU should strive for a simple and user-friendly registration system that is preferably accessible via a secure website. Such a concept allows the authorized internal and external users of the registration system to make anywhere and at

any time a registration or a consultation. The registration itself should not contain information which enables one to identify the concerned persons. However, a link between the written notification and the automated registration needs to be made through a unique disclosure number.

The actual registration is primarily aimed at gathering policy-relevant information, including:

- General characteristics of the whistleblower: staff or subcontractor;
- General job-related characteristics of the (presumed) subject ('perpetrator'): employed or not, managerial or not, institution, service
- General features of the undertaken action: investigation or mediation, type of investigation (administrative or disciplinary), declaration to judicial authorities (yes/no);
- General characteristics of the allegation: violation type, internal or external victim, work or private related;
- General characteristics of the handling of the disclosure: outcome of the investigation or mediation, type of settlement (disciplinary measure, criminal or administrative sanction).

Recommendation 4: Evaluate the working of the (new) whistleblowing provisions

Time horizon: long

In addition to the coordinated registration system, the EU Institutions with a higher risk profile should, on a regular basis, seek information from its line and senior managers on how the system is working. This is important because line and senior management will normally both receive and deal with whistleblowing concerns, some of which will not formally be raised under the policy.

Furthermore, the EU Institutions should also assess levels of staff (and subcontractor) awareness of and confidence in the (new) policies. Depending on the size, nature and risk profile of the concerned EU Institution, this can be done at team briefings, by questions in a general staff satisfaction survey, by a dedicated confidential survey on the workplace culture, or by a random sample.

4.2.2 Professionalization of the whistleblowing process

We strongly believe that a professionalization of the whistleblowing process - from early support, over assessment, to investigation or another appropriate action and finally follow-up and settlement - is absolutely necessary to (re)build trust. Any reform will be doomed to fail if this sub-objective is not given the first priority.

4.2.2.1 Recommendation 5: Organise internal support to potential whistleblowers

Time horizon: middle term

Internal support to potential whistleblowers is an unmet challenge within the EU Institutions. We recommend that the EU institutions with a higher risk profile develop programmes for ensuring that internal support can be delivered. Sources of such support can be:

- Providing a checklist to the potential whistleblower;
- Designating officers with an institutional role that conflicts as little as possible with the challenges often implicit in providing that support;
- Increasing management initiatives rather than simply disclosure-driven actions;
- Supporting arrangements tailored to identified risks of reprisal, workplace conflict or other adverse outcomes;
- Involving whistleblowers in risk assessment and support decisions.

Although no internal support programme can hope to eliminate every case in which a whistleblower feels aggrieved, the EU institutions have both an opportunity and a responsibility to significantly reduce the number of staff (or subcontractors) falling into these categories, thereby lessening the costs of disclosure-related conflicts and earning greater (public) confidence in their own integrity.

4.2.2.2 Recommendation 6: Set up an independent disclosure, advice and referral body

Time horizon: short term

Our study clearly indicates there is an urgent need for an independent body outside the EU institutions comparable with the British Public Concern at Work (PCaW) which fulfills the following functions:

- Advice and support to (potential) whistleblowers;
- Reception, registration and assessment of disclosures with a confidentiality guarantee;
- Referral to the appropriate investigative body (OLAF or IDOC) or to a mediation authority in function of the nature of the disclosure;
- Monitoring and delivery of timely and accurate feedback to the whistleblower.

Taking into account the existence of the freephone and online reporting tool within OLAF (FNS) on the one hand and the established incompatibility between the support and the investigation function on the other hand, we strongly advise to make the obvious choice to transfer this facility to a new independent body as soon as operationally possible.

We also believe it would be prudent that this independent body, in order to make it effective and credible, must have:

- Adequate powers;
- Adequate resources;
- Multidisciplinary expertise (judges, prosecutors, forensic experts, etc.).

As to the form of this independent body, we see at least three options to operationalize this:

- An expert panel, potentially including staff capacity;

- An external service provider;
- An NGO like for instance Transparency International.

As to the creation and funding of this body, we believe a solution can be found via an inter-institutional agreement.

An additional option could be to provide an appeal procedure for whistleblowers with the possibility for the independent body. We believe this is crucial since we noted throughout the analysis of the cases that form takes priority over substance and this should be changed. Most interviewed whistleblowers stressed the negative experiences they had and sketched the different acts to discredit them. This independent body should

- Review the OLAF investigation;
- Organise a follow-up investigation with an ad-hoc investigative capacity (outside OLAF).

4.2.3 Protection and sanctions

We are convinced a good balance needs to be found between encouraging bona fide whistleblowers and discouraging malicious whistleblowers.

4.2.3.1 Recommendation 7: organise strong protection and encouragement for whistleblowers

Time horizon: short term

When the new whistleblowing policy will be developed, it is obvious strong protection provisions need to be added to meet the standard of the benchmark.
From the six protection provisions outlined in the benchmarking, we want to emphasize once again that in our opinion the most important protection is the guarantee that the identity of the whistleblower will be treated in confidence. Such a guarantee is a right, but not an absolute right. Therefore we suggest the EU institutions adopt the following approach: the confidentiality will be guaranteed unless an urgent reason exists. An urgent reason is only present when the following five conditions are met:

1. Everything has been done to obtain the permission of the whistleblower;
2. The handling officer is in a moral dilemma by maintaining the confidentiality;
3. There is no other solution than breaking the confidentiality;
4. It's almost certain that not breaking the confidentiality will encounter demonstrable and serious damage or endanger involved (third) parties;
5. The handling officer is almost certain that breaking the confidentiality will prevent or significantly reduce that damage or danger to the involved (third) parties.

Furthermore we suggest that mechanisms are put in place to:

- To monitor the welfare of staff members who disclose wrongdoing, from the point of first report;
- A zero tolerance approach is adopted for organizational mistreatment or neglect;

- Expertise is made available for investigating alleged detrimental actions.

The first and last mechanism could be made operational by the independent body as part of their support function.

4.2.3.2 Recommendation 8: set up balanced mechanisms to deal with potential malicious whistleblowing

Time horizon: short term

In order to avoid the perception by line management and/or senior management that all whistleblowers are troublemakers with a hidden agenda (self-interest) we believe it is necessary to set up filters in the whistleblowing policy to discourage malicious whistleblowers. We want to underline however a clear distinction has to be made between a malicious whistleblower and a misguided whistleblower. The latter has to be considered as a bona fide whistleblower.

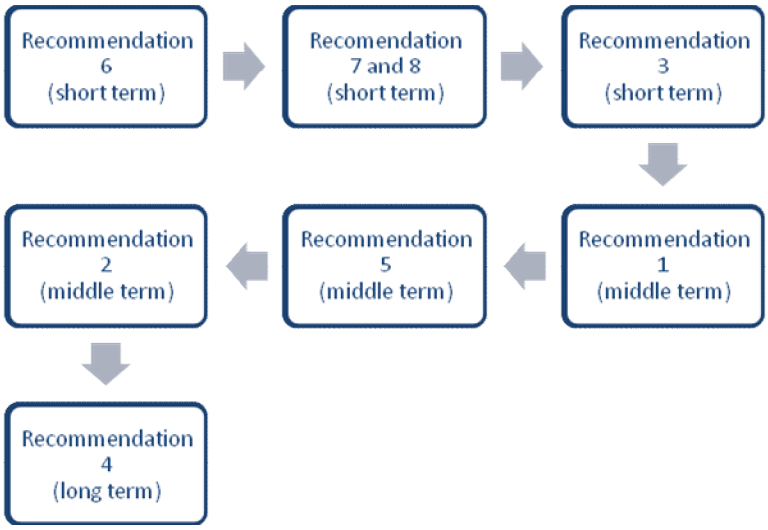
A first filter is already the assessment made by the designated internal officer or the independent body. If after a first preliminary investigation is becomes obvious the concerned whistleblower is malicious, the designated officer or the independent body should sent a complaint to the competent disciplinary authority.

The second filter is the full investigation done by OLAF or IDOC (or any other disciplinary body). If the concerned investigator has clear indications or evidence the whistleblower is malicious, a complaint should be sent to the competent disciplinary authority.

At the same time, however, the burden of proof for malicious whistleblowing should lie on the side of the administration. In other terms: the whistleblower should not be forced to have to prove that his motivation was 'bona fide'.

4.2.4 Critical path for transition

In order to make this transition from the actual situation to the desired situation possible within a reasonable timeframe, we suggest the EU institutions follow the following critical path:



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APPENDICES

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